



# SANTA CLAUS

LAW, FOURTH INDUSTRIAL REVOLUTION,  
DECOLONISATION AND COVID-19

Editor | Letlhokwa George Mpedi



# SANTA CLAUS

*Law, Fourth Industrial Revolution,  
Decolonisation and Covid-19*

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Letlhokwa George Mpedi

(Editor)



*SANTA CLAUS: Law, Fourth Industrial Revolution, Decolonisation and COVID-19*

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*This book is dedicated to all those who  
(do not) believe in Santa Claus.*



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# Preface

The origins of Santa Claus, or so I am told, is that the young Bishop Nicholas secretly delivered three bags of gold as dowries for three young girls to their indebted father to save them from a life of prostitution. Armed with immortality, a factory of elves and a fleet of reindeer, his has been a lasting legacy, inextricably linked to Christmas.

Of course, this Christmas looks a little different. Amidst a global pandemic, shimmying down the chimneys of strangers certainly does not adhere to social distancing guidelines. Some borders remain closed, and in some instances, the quarantine period is far too long. After all, he only has 24 hours to spread cheer across the world. As with the rest of us, Santa Claus is likely to get the remote working treatment. The reindeers this year are likely to be self-driving, reminiscent of an Amazon swarm of technology, and the naughty and nice lists are likely to be based on algorithms derived from social media accounts. In the age of the fourth industrial revolution, it is difficult to imagine that letters suffice anymore. How many posts were verified as real before shared? Enough to get you a drone. Fake news? Here is a lump of coal. Will we see elves in personal protective equipment (PPE) and will Santa Claus, high risk because of age and his likely comorbidities from the copious amount of cookies, have to self-isolate in the North Pole? In fact, will there be any toys at all this year? Surely production has been stalled with the restrictions on imports and exports into the North Pole. Perhaps, there is a view to outsourcing, or perhaps, there is a shift towards local production and supply chains.

More importantly, as we have done in many instances in this period, maybe we should pause to reflect on the current structures in place. The sanctification of a figure so clearly dismissive of the Global South and to be critical, quite classist must be called into question. From some of the keenest minds, the contributions in this book make a strong case against this holly jolly man. We traverse important topics such as, is the constitution too lenient with a clear intruder who has

conveniently branded himself a Good Samaritan? Allegations of child labour under the guise of elves, blatant animal cruelty, constant surveillance in stark contrast to many democratic ideals and his possible threat to national security come to the fore. Nevertheless, as the song goes, he is aware when you are asleep, and he knows when you are awake. Is feminism a farce to this beloved man – what role does Mrs Claus play and why are there inherent gender norms in his toys? Then is the worry of closed borders and just how accurate his COVID-19 tests are. Of course, this brings his ethics into question. While there is an agreement that transparency, justice and fairness, nonmaleficence, responsibility, and privacy are the core ethical principles, the meaning of these principles differs, particularly across countries and cultures. Why are we subject to Santa Claus' notions of good and evil when he is so far removed from our context? As Richard Thaler and Cass Sunstein would tell you, this is fundamentally a nudge from Santa Claus for children to fit into his ideals. A nudge, coined by Thaler, is a choice that predictably changes people's behaviour without forbidding any options or substantially changing their economic incentives. Even with pinched cheeks and an air of holiday cheer, Santa Claus has to come under scrutiny. In the process of decolonising knowledge and looking at various epistemologies, does Santa still make the cut?

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It follows naturally that the opinions expressed in this book are essentially those of the authors. Therefore, they do not represent in any sense the views of the University of Johannesburg or its Faculty of Law.

I hope that you will enjoy this book as much as the contributors and I enjoyed putting it together.

He he he! Merry Christmas!

LETLHOKWA GEORGE MPEDI  
Johannesburg  
November 2020







# *Part 1*

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## *A Man with a Past*





# 1

## *General Introduction*

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*Letlhokwa George Mpedi*

### *1. Introduction*

This book is about a famous man, a globalist (Harcourt, 2011), by the name of Santa Claus. It focuses on four themes, namely: law, the fourth industrial revolution, decolonisation and COVID-19; and is divided into six sections.

### *2. Part 1: A man with a past*

Part 1 of the book provides a general overview. It comprises two chapters. The first chapter provides a wide-ranging impression of the contents of the book. Chapter 2 by Frahm-Arp introduces the reader to the weird, wonderful and often unholy history of Christmases with a focus on Constantine, the Roman Empire and the formation of Christmas; medieval Christmas and twelve days of frivolity; St Nicholas and gift-giving in medieval Europe; the rise of protestant Christianity and the banning of Christmas; re-imagining Christmas; opening presents on 7 January – the Orthodox Christmas; and Christmas in Africa – the Ethiopian Orthodox Church and the Zion Christian Church.

### *3. Part 2: Above the law?*

Part 2 of the book concentrates on the question of whether Santa and his associates may be or are above the law. Section 9(1) of the Constitution of the Republic of South Africa, 1996 makes it clear that “Everyone is equal before the law and has the right to equal protection

and benefit of the law". However, Santa Claus seems to be violating South African laws with impunity. For example, he violates the sovereignty of South Africa by flying over and landing within its territory without permission and without using a designated port of entry, he drinks alcohol and flies, and breaks into people's private homes. Flying the unfortunate reindeer around the world should surely amount to animal cruelty of the worst order.

This part of the book comprises five chapters that directly and indirectly address the above question. Chapter 3, by Watney, is the *State v Santa Claus and 4 Others*. This is a criminal case brought against Santa Claus and four of his accomplices for the following charges: conducting an enterprise through a pattern of racketeering activity; kidnapping; intimidation; unlawfully selling, dispensing and/or distributing of liquor, failure to comply with the prohibition on entering places and premises closed to the public: nightclubs; and operating a bus service and/or taxi and/or sleigh services for long-distance travel exceeding 70% of the licensed capacity.

In Chapter 4 Van Eck presents a letter of demand against Santa for noncompliance with the South African legislative framework, particularly the Consumer Protection Act 68 of 2008, Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, and Protection of Personal Information Act 4 of 2013. Alberts in Chapter 5 provides Santa with an opinion on the use of Santa Paws and the phrase 'ho ho ho' in welcoming customers by a business in the Western Cape. He advises Santa on the legal position as regards the use of Santa Claus/Santa Paws. He argues that the use of Santa Paws by an undertaking in the Western Cape can cause confusion and 'passing off' would be a viable remedy to safeguard Santa's rights. Furthermore, he advises Santa that his use of 'ho ho ho' can be protected by filing a trademark application for it. This, Alberts argues, must be lodged as a musical annotation for the sound. In Chapter 6 Lenong looks at the appearance of Rudolph the reindeer in Kudumane Magistrate's Court. He deals with the question of whether the enigmatic fall from the sky of this strange animal, a donkey with 5G antennas, is a threat to national security or merely making merry. I guess we will never know

because the appearance of the mysterious animal at the Kudumane Magistrate's Court, which was the talk of the town, ended as mysteriously as it began with Rudolph escorted to his sleigh by ostriches in black. Nkosi in Chapter 7 argues that Santa should thank his lucky stars that South Africa is a constitutional democracy. Otherwise, he could have been burned at the stake or faced a firing squad for his penchant of contravening countless South African laws and regulations. He recounts all the instances where Santa violated the South African laws almost at every corner of the country. He concludes by arguing that Santa is a lucky man indeed in the sense that he would have been faced with a difficult choice (namely, death by fire or execution by firing squad) if he landed in a country, other than South African, headed by a dictator that does not care about human rights.

What is clear from these chapters is that Santa and his associates are not above the law. He and his accomplices have been indicted in the High Court and he is served with a letter of demand. His employee, Rudolph, had a lucky escape from lady justice at the Kudumane Magistrate's Court. Despite his propensity to infringe the South African law, Santa is entitled to the equal enjoyment and protection of the law offered by the Constitution of that country. He can seek a legal opinion on the protection of his trademark (i.e. his recognisable name (Santa Claus) and phrase ('ho ho ho')). Furthermore, despite his disdainful tendency of making a mockery of South African law, he is afforded the same rights contained in the Constitution just like any law-abiding human beings who live or sojourn within the geographic borders of the country. This is true to our constitutional democracy. How ironic! To a great degree, Santa Claus' approach to our law reminds me of a breed of 'deployees', comrades, cadres, *maqabane* or whatever they call themselves these days. The group in question tends to think that the law does not apply to it and its family members, friends and cronies as they help themselves to the state resources, particularly the hard-earned taxpayers' money, and seek to rely on it when it suits them. For their information, the sword and shield provided by the law are not available when we feel like having any of them. They are or should be there at all times.

#### 4. Part 3: *Elves of the world, unite!*

The plight of the elves reminds one of the profound words contained in the Communist Manifesto, namely "*Proletarier aller Länder, vereinigt euch!*" ("Proletarians of all countries, Unite!") (Communist Manifesto). The elves have nothing to lose except the Santa's shackles. Fourie kick-starts this Part of the Book in Chapter 8 by revealing four reasons why Santa is not the employer of the year. She shines the spotlight on the unbearable working conditions that the elves and reindeer are subjected to. These include the long working hours, bullying, working without protective gear, (sexual) harassment, unfair labour practices and unfair dismissal. It is therefore not surprising that the chapter concludes with a newsflash in which it issues a warning about Christmas that is on the verge of being ruined due to possible strike action by the elves. In Chapter 9 Jacobs exposes Santa for having been naughty this year by riding the fourth industrial revolution wave (by, *inter alia*, using the drone technology to load the sleigh with toys and deliver them all over the world) and side-lining the elves and reindeer. True to Santa's nature of having little or no respect of employment law, he did not inform and consult with the elves when he introduced the new technologies to his operation. As illustrated in this chapter Santa has pushed elves and reindeer too far on this occasion. This is because his actions yielded the wrath of the elves and reindeer in a form of strike action and riot, which brought the recalcitrant Santa to his senses. Can things stay that same? Reading between the lines, it seems only time will tell. One thing for sure is that elves and reindeer lives matter. They have (labour and social security) rights too. Jacobs concludes by asking the question "is Santa really bound by South African law or does he play by a completely different set of rules?"

Van Staden's chapter 10 offers an answer to the aforementioned question posed by Jacobs. In this chapter, Floppy the elf takes Santa to the Commission for Conciliation, Mediation and Arbitration (CCMA) for unfair dismissal. The dispute, as referred by Floppy, is about an unfair dismissal (based on poor work performance and incapacity) and unfair discrimination. The fact that Floppy has referred a dispute to the CCMA suggests that Santa is subject to South African (labour) law.

However, before I jump to a wrong conclusion, Floppy will have to show that the CCMA has the jurisdiction to hear the matter. It should be recalled that as previously pointed out by the Labour Appeal Court in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd* [2008] 9 BLLR 845 (LAC): "The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court."

In Chapter 11 Nel addresses the widespread and systematic age-based discriminatory practices and policies perpetrated by Santa and his elves. He does that by reflecting on the applicable legal standards regarding equality and non-discrimination based on age, age as a listed ground of discrimination, and the enquiry into a violation of the right to equality in the present case. He concludes by calling for the recognition of the inherent dignity and equal and inalienable rights of all human beings and an all-inclusive and non-discriminatory policy of Christmas gifting for all ages.

## *5. Part 4: Gender, culturally and politically insensitive Mr Claus*

This Part of the publication highlights one of Santa's annoying character traits. That is the utter lack of gender, culture and political sensitivity. For example, he lacks a sense of propriety. What kind of a man goes around saying 'ho ho ho' in this day and age? This man is unbelievable! He even asked for an opinion about protecting this phrase as a trademark (see Chapter 5). He sees nothing wrong with the phrase and might think I am the one with the problem. Before I am called names, I would like to refer Santa to the Urban Dictionary and Queen Latifah's song "U.N.I.T.Y". Hopeful he will get the point and substitute 'ho ho ho' with 'he he he' or 'ha ha ha' as is, I understand, the case in Australia.

Chapter 12 by Van der Merwe opens up this Part of the book with a letter to Santa Claus. This letter addresses several gender sensitives issues that Santa seem to ignore such as systematic discrimination,

bias and sexism that Santa is well known for. It asks Santa a poignant question why his "office employs so few female elves". To drive its point home, the open letter articulates the relevant legal framework in South Africa which is built firmly of the Constitution. It concludes by drawing Santa's attention to women trailblazers Charlotte Makgomo Maxeke, Ada Lovelace, Katie Bouman and Shirley Ann Jackson. This is a solid reminder to Santa, as the Tired Feminist puts it, that he should "never doubt what we women bring to the table because, as my letter reminds you, we are the table!"

In Chapter 13 Magongoa discusses one of the sensitive issues in African culture that Santa disregards when he goes about his nocturnal business in South Africa. Entering and living a house through any access point to the house that is not a door and bringing or taking things from the house at night is taboo. This kind of behaviour illustrated by Magongoa is associated with witchcraft. The fact that Santa flies on his sleigh powered by reindeer does not help the situation. Santa lets himself into the house through the chimney unannounced. This is, as argued by Magongoa, culturally impolite. Despite his cultural insensitivity, the truth that Santa comes bearing gifts may render him the only acceptable witch. However, the chapter suggests that his culturally repugnant nocturnal ways are not irredeemable. They can be remedied using technology, particularly online gift delivery services.

Mpedi in Chapter 14 argues that the Black Pete figure that serves as Santa Claus' assistant in Europe, particularly in the Netherlands, is racist and offensive. He argues that Santa should learn from, *inter alia*, the Clicks 'natural hair' debacle and H&M 'monkey hoodie' saga. The Chapter asserts that due to Santa's standing as a global figure he should unite people and not divide them. His questionable antics, i.e. the use of Black Pete, elsewhere should be challenged in South Africa if he does not change his offensive tendencies. After all, Black Lives Matter.

## 6. *Part 5: 4IR to the rescue?*

Part 5 builds on the previous parts of the book where suggestions were advanced for Santa to use technology in his quest to spread the Christmas cheer. Reddy, in Chapter 15, deals with Santa's unlawful surveillance of people using AI technologies to determine who is naughty or nice. Chapter 16 by Smidt reports on a huge fine that Santa received for using illegally collected data in his operations. Accordingly, Chapter 15 and 16 makes it clear that in as much as data-driven technology can be helpful to Santa's business, such data must be collected and handled as per the applicable law. Secondly, Santa and his associates are not above the law. In Chapter 17 De Villiers deals with truth, lies, virtual reality and storytelling with a particular focus on Santa Claus and teaching. He argues that the widely told story of Santa Claus can be used as a tool for teaching and learning law. In that regard, he contends that law teachers should learn to adapt stories learnt as children to the story of the South African legal system and most importantly use aspects of fiction and storytelling to explain reality. This, De Villiers postulates, should be supported by virtual and augmented reality technologies, which will enable teachers and their students to do things with instead of hearing, reading or watching about them. He concludes by fantasizing about a virtual ride of a lifetime with Santa that can make him believe that Santa is real or, more appropriately, virtually realistic. 4IR rules! Scan the Quick Response code below for further discovery and enlightenment.



## 7. *Part 6: Disentangling COVID-19 from the Christmas cheer*

They say in every disadvantage there is good fortune. However, COVID-19 seems to have brought more deprivation than prosperity to many individuals and their families. To make matters worse it appears

that more misfortune is on the way in the form of a dreary Christmas without the gifts. The final part of the book consists of three chapters which give hope that a jolly Christmas is possible amidst COVID-19. Firstly, Hugo in chapter 18, advises St Nicholas via Zoom on a performance guarantee and COVID-19. The issue at hand is that St Nicholas may not be able to personally deliver the football boots to Tshepo due to the national lockdown in South Africa. Accordingly, Hugo, advises St Nicholas on the legal consequences that arise should Tshepo call up the guarantee. In chapter 19, by Calitz, the elves save Christmas through business rescue after COVID-19 brought Santa & Co to its knees. Last but not least, Munyai in Chapter 20 discusses Santa's mission to happiness. This seems like mission impossible due to COVID-19 and the impending arrest of poor Santa for violating the fundamental right to privacy of the good folks of the People's Republic of China and the Republic of South Africa

## *8. Some concluding observations*

Santa Claus is a man with a past. A colourful past indeed. This man changed colours from time to time. It is reported that his suit was tan and, later, green in colour. That was of course before he changed to red and white after he was rather 'captured' by the company that sells surgery water. What a true reflection of the white monopoly capital. Irrespective of how you feel about Santa's past, colours and whom he keeps company with, it is hoped that this publication has provided some further perspectives on this elusive man. Whether you like him or not, that is your call to make. Needless, to say, all the good and bad contained in this book are only in jest. Accordingly, no harm to Santa and his kin, associates and animals is intended. All the names mentioned in the publication are imaginary. However, any resemblance to actual events or locations or persons, dead or alive, is either entirely coincidental or it is only in your hyperactive mind. Ha! Ha! Ha!



## 9. *List of references*

Communist Manifesto "Working Men of All Countries, Unite!" Available at:  
<https://www.marxists.org/archive/marx/works/1848/communist-manifesto/ch04.htm>. (1 November 2020).

Harcourt T (2011) "Santa Claus as a Symbol of the Global Economy",  
available at: <https://www.theglobalist.com/santa-claus-as-a-symbol-of-the-global-economy/> (Accessed: 1 November 2020).

# 2

## *The Weird, Wonderful and Often Unholy History of Christmases*

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*Maria Frahm-Arp*

### *1. Introduction*

Due to the commercialization of Christmas, we all think we know what Christmas is and that Christmas is, well, Christmas. But there isn't actually one type of Christmas and never has been. This chapter gives a brief overview of the history of Christmas and how we come to have the types of Christmases we currently celebrate.

### *2. Constantine, the Roman Empire and the formation of Christmas*

The earliest church had no concept of Christmas which only became a Christian holy day under the reign of Emperor Constantine in 336 CE. As part of his larger project to use Christianity as a means to unify the eastern and western Roman Empires, Constantine declared that Jesus, as the saviour and king of the new Rome official religion, Christianity, needed his own birth date just as the previous Roman gods had had. Constantine chose the 25<sup>th</sup> of December as the birth date of Jesus because it was already an important Roman religious holiday. What better way to stamp out the old Roman ways than to overshadow them with new Christian festivals? The 25<sup>th</sup> of December was for some Romans the most sacred day of the year as it was the birthday of Mithra the great warrior god and 'god of the unconquerable sun' (<https://www.history.com/topics/christmas/history-of-christmas>) who was highly acclaimed by soldiers and the ruling classes. This was also

the time of the year when people celebrated overcoming the winter solstice and Saturn the god of agriculture with great feasting and drinking. By 432 Christmas as the birth date of Christ on the 25<sup>th</sup> of December had become custom throughout the Roman empire as far as Egypt and Britannia.

### *3. Medieval Christmas and twelve days of frivolity*

By the beginning of the Middle Ages, most of Europe had been converted to Christianity. Various pagan rituals, symbols and ideas were merged into European Christianity and also influenced the celebration of Christmas. The Scandinavians celebrated the winter solstices on the 21<sup>st</sup> of December as Yuletide, and they would bring great logs of wood into their homes to burn for 12 days (<https://www.history.com/topics/christmas/history-of-christmas>).

In what is now Germany, people would bring evergreen branches of pine and fir trees into their homes as a promise of the coming spring and a sign of fertility (Travers, 2019). Pine trees were believed to channel messages from the earth to the god Thor in the heavens above and were regarded as having special powers. As Germany became Christian people began to bring the pine trees into their homes over the Christmas period and decorate them with nuts, apples and gingerbread figures (Travers, 2019).

Throughout Catholic Medieval Europe Christmas with its roots in the Roman festivals of Mithra and Saturn was a time of merriment and frivolity. The four weeks leading up to Christmas, Advent, were a time of fasting and introspection which came to an end on Christmas Eve the 24<sup>th</sup> of December and marked the beginning of the 12 days Christmas until the Twelfth night the 5<sup>th</sup> of January. On the 6<sup>th</sup> of January Epiphany (when the wise men from the East came to worship the baby Jesus as king) was celebrated. The 12 days of Christmas were a time of celebration and people decorated their homes with holly, ivy and mistletoe. During this time people either had left from work or worked much shorter days. Troupes of singers or wassailers would travel around the countryside singing 'caroles' – a French word for a

song that was accompanied by dancing. It is from here that Christmas carols as we know them emerged. Carols were popular songs that everyone could sing together. At this time of year, people travelled to be with family and this was a time marked by lots of drinking and eating especially mince pies, plum porridge, gingerbread biscuits and other delicacies that used the expensive spices that were first imported to Europe during Medieval period (<https://www.bbc.com/culture/article/20141219-when-christmas-carols-were-banned>).

#### *4. St Nicholas and Gift Giving in Medieval Europe*

Before Christianity became the state religion in the Roman Empire, it was banned and Christians were persecuted for their faith. One of the great martyrs of the faith was St Nickolas who, before his execution, was bishop of Myra in modern-day Turkey. The date of his death, the December 6, became a popular saint's day and by the Middle Ages, it was widely celebrated throughout the Christian world. Part of the popularity of St Nickolas was that he was the patron saint of children and the vulnerable and many legends were told of how he gave children gifts. One of the most popular ways that he saved three young girls from being sold into prostitution so that their father could pay off his debts when he miraculously gave their father a gift of a bag full of gold coins. St Nickolas had been a disciplined and ascetic man but by the beginning of the sixteenth century he was depicted as a man with a long white beard who was able to fly and he could see what children did throughout the year. He only gave gifts to good children on his feast day (<https://www.nationalgeographic.com/news/2018/12/131219-santa-claus-origin-history-christmas-facts-st-nicholas/>).

During the Medieval period gifts were not given at Christmas but to children on the feast day of St Nickolas and these were usually things like oranges, a great luxury during winter.

## 5. *The Rise of Protestant Christianity and the Banning of Christmas*

It is difficult to believe that at one point in history Christmas was banned! In the 1500s in Europe, the Protestant churches broke away from the Catholic church, which had been the only church in Europe for many centuries. The Protestants did not believe in saints and banned the celebration of saints' days. This meant that the celebration of St Nickolas began to fall away and the giving of gifts slowly moved to the birth date of Christ. As much of the Netherlands became Protestant families were not prepared to give up Sinter Klaas as they lovingly called St Nickolas and the giving of gifts by Sinter Klaas continued to be remembered on the 6<sup>th</sup> of December (<https://www.nationalgeographic.com/news/2018/12/131219-santa-claus-origin-history-christmas-facts-st-nicholas/>).

The Protestant churches also put an end to the 12 days long feasting of Christmastide which had become somewhat like our modern carnivals.

Under the Puritan Christians in England Oliver Cromwell and Parliament banned Christmas and its celebration in any form in 1644. Christmas as a celebration of the birth of Christ was only reinstated by King Charles in 1660. In Puritan parts of America Christmas was also outlawed between 1659 and 1681. In Boston, the ban lasted until 1824!

## 6. *Re-imagining Christmas: A family holiday with presents for all*

Between the seventeenth and eighteenth centuries, Christmas became reshaped into a much shorter festival usually from the evening of the 24<sup>th</sup> of December until the 26<sup>th</sup> of December and it centred around the family, family values with a focus on children. By the beginning of the 1800s, two important social shifts happened in Western countries: 1) a new understanding of childhood and 2) an emerging middle. Children began to be seen as different from adults and only expected to begin to work around the age of nine or ten years sometime in the 1600s.

And it was during this period that the idea of children being given some form of education emerged. With the establishment of factories in Europe in the 1700s, there was a new demand for child labour but this was hotly contested and in Britain child labour was outlawed in 1833 (<https://frontlineielts.com/TheConceptofChildhoodinWesternCountries>).

The second was the emergence of a middle class that had cash to spend on small luxuries. In this context in the 1800s in Western countries, Christmas became transformed as a festival celebrating families with a particular focus on children and giving children gifts so that they could enjoy their childhoods and play with the gifts they were given. A whole industry around children's toys grew exponentially during this time, particularly as middle-class parents had money to spend on the luxury of children's toys.

Two books played a major role in developing the myth of the perfect Christmas. The first *The Sketchbook of Geoffrey Crayon* was written by Washington Irving and published in 1819 and sketched out what the ideal Christmas in an English manor house looked like (<https://www.history.com/topics/christmas/history-of-christmas>).

It became a bestseller and was followed in 1843 by Charles Dickens' *A Christmas Carol*. Dickens evocatively wrote about the joy of gift-giving and giving presents to children were seen by him as being a central part of Christmas. During the nineteenth century, the idea of Christmas as a time for giving was established in the psyche of western societies.

## 7. *Americanisation of Christmas: Christmas trees, Santa Claus, Reindeer and Turkey*

In 1870, Christmas as a federal holiday on the 25<sup>th</sup> of December was finally passed as law in the USA. The Americans embraced Christmas picking, mixing and reimagining various European traditions from which immigrants came, to develop the 'traditional' Christmas we have become familiar with. One of the most classical examples is the Christmas Turkey. Turkeys are not found in Europe and Europeans

traditionally ate a goose at Christmas. In North America, turkeys were more readily available and so replaced the traditional goose.

In the late 1700s decorating Christmas trees, which had been a practice in German homes, began to gain popularity in the homes of the nobility in Europe. The trees would be decorated with paper decorations, candles and gold ribbon (Tavers, 2019). The Americans took the German tradition of the Christmas tree and made it an iconic part of Christmas with festivals lighting Christmas trees in villages and town squares soon becoming a central feature of Christmas when electricity became available. Decorations become commercialised with tinsel, glass burbles, colourful figures and lights seen as essential to the 'perfect tree'.

As Christmas became more commercialised, so buying decorations for the tree, gifts for friends and family and sending cards to loved ones back in the 'home countries' of Europe all grew in popularity. The Dutch settlers brought with them their love of Sinter Klaas the saint with a long red coat and white beard who brought children gifts on his saint's day the 6<sup>th</sup> of December. But as America was a Protestant country and saints were not venerated the saint began to give gifts to children on Christmas day and his name was changed to Santa Claus in English. In 1822 the Rev Clement Clarke Moore wrote a poem depicting St Nicholas or Santa Claus as a jolly old man who flies through the skies with his reindeer delivering gifts to children on the night before Christmas. From here on the magic of Santa Claus just grew and grew. In 1881 Rudolph the red-nosed reindeer was added to the Christmas caste when Robert L. May wrote a poem about this beloved reindeer in 1939 (<https://www.history.com/topics/christmas/history-of-christmas>).

#### 8. *Opening presents on the 7<sup>th</sup> of January – the Orthodox Christmas*

The Gregorian calendar came into use in the 1580s but was not adopted by the Eastern Orthodox Churches who continued to use the Julian calendar. The Julian calendar used in the East was 13 days behind

the Gregorian calendar. Using the Julian calendar, the Orthodox churches celebrated the birthdate of Jesus 13 days later, on the 7<sup>th</sup> of January (according to the Gregorian and modern calendar). This meant the Orthodox churches celebrated the birth of Christ when the Western Latin church celebrated the Epiphany (12 days after the birth of Christ on the 6<sup>th</sup> of January), the arrival of the wise men from the East who brought the Christ-child gifts of myrrh, frankincense and gold. Some Orthodox churches have moved to the Gregorian calendar, but the Russian and Egyptian Orthodox churches still hold to the Julian calendar and celebrate Christmas on the 7<sup>th</sup> of January (Blackmore, 2019).

#### *9. Christmas in Africa – the Ethiopian Orthodox Church and the ZCC*

The Ethiopian Orthodox church in Africa also celebrates Christmas, known as Ganna, on the 7<sup>th</sup> of January. As in other Orthodox Christian countries, people wear white on Christmas day. Many people go to Christmas mass which begins at 18:00 on the 6<sup>th</sup> of January and continues until 03:00 on Christmas day the 7<sup>th</sup> of January: ([https://www.whychristmas.com/cultures/ethiopia.shtml#:~:text=The %20Christmas%20celebration%20in%20the,Prophets'%20\(Tsome%20Nebiyat\).](https://www.whychristmas.com/cultures/ethiopia.shtml#:~:text=The%20Christmas%20celebration%20in%20the,Prophets'%20(Tsome%20Nebiyat).))

In South Africa, Christmas has also been adapted by African Independent Churches (AIC) such as the Zionist Christian Church (ZCC), the largest AIC in South Africa. The church celebrates Christmas on the 25<sup>th</sup> of December and every year they have their annual Christmas Conference when millions of people go to Moria, the headquarters of the ZCC. But in the ZCC, as in other AICs, Christmas is not as big or important a festival as Easter and so far fewer people go to Moria at Christmas than at Easter.

Generally, in South Africa, Christmas is a time for family for most people. Due to the migrant labour system that many people live in the cities far away from their families or extended families and the only time they can see them is at Christmas when most businesses are



closed for the summer holidays from the 16<sup>th</sup> of December until the 2<sup>nd</sup> of January. For most people receiving new clothes is one of the great treats of Christmas and food with lots of meat and plenty to drink is a highlight for the whole family.

## *10. List of references*

Blackmore E (2019) "Why some people celebrate Christmas in January".

Available at:

<https://www.nationalgeographic.com/history/reference/holidays/why-celebrate-christmas-january/>. (Accessed: 2 September 2020).

"Christmas in Ethiopia". Available at:

[https://www.whychristmas.com/cultures/ethiopia.shtml#:~:text=The%20Christmas%20celebration%20in%20the,Prophets'%20\(Tsome%20Nebiyat\)](https://www.whychristmas.com/cultures/ethiopia.shtml#:~:text=The%20Christmas%20celebration%20in%20the,Prophets'%20(Tsome%20Nebiyat)). (Accessed: 1 November 2020)

Frontline "The Concept of Childhood in Western Countries". Available at:

<https://frontlineielts.com/TheConceptofChildhoodinWesternCountries> (Accessed: 1 November 2020).

Handwerk B (2018) "From St. Nicholas to Santa Claus - the surprising

origins of Kris Kringle: Santa Claus, Father Christmas, St. Nick—no matter the name, everyone knows the story of this plump, jolly, bringer of gifts. Or do they?". Available at:

<https://www.nationalgeographic.com/news/2018/12/131219-santa-claus-origin-history-christmas-facts-st-nicholas/>. (Accessed: 2 September 2020).

"History of Christmas". Available at:

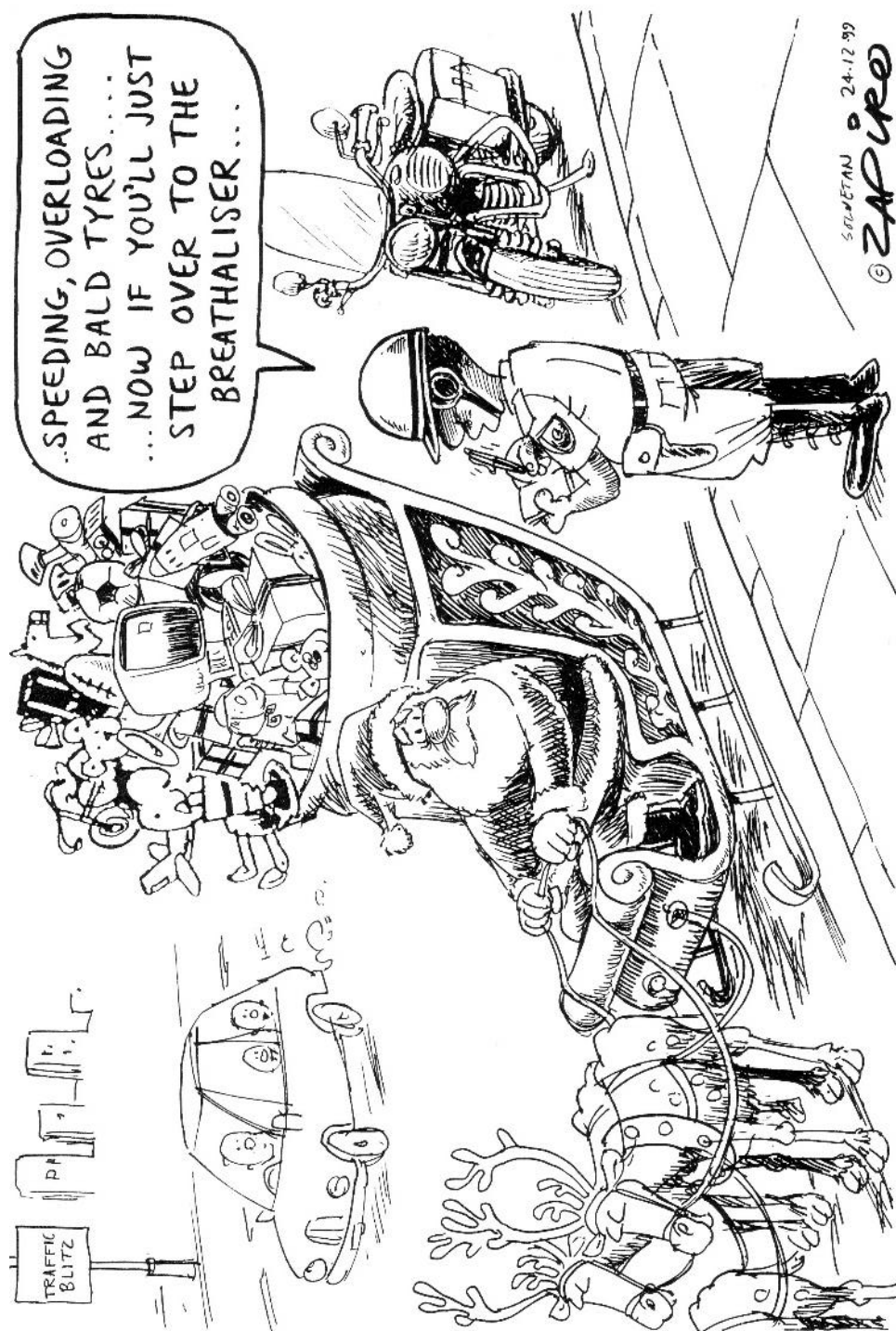
<https://www.history.com/topics/christmas/history-of-christmas>. (Accessed: 8 September 2020).

Travers P (2016) "The Christmas tree: From pagan origins and Christian symbolism to secular status". Available at:

<https://www.abc.net.au/news/2016-12-19/the-history-of-the-christmas-tree/8106078>. (Accessed: 2 September 2020).







## Part 2

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### *Above the Law?*



# 3

## *The State v Santa Claus and 4 Others*

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*Murdoch Watney*

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

The Director of Public Prosecutions for the South Gauteng High Court of South Africa, who as such prosecutes on behalf of the State, hereby informs the Honourable Court that:

**1**    *Santa Claus*

a 250-year-old fly-by-night Neuralink-enhanced male philanthropist residing at Speed Avenue, North Pole

**2**    *Lethhokwa Mpedi*

a 45-year-old well-connected male legal eagle residing at Sunset Boulevard, Ruimsig

**3**    *Rudolph Deer*

a 180-year-old high-flying stag residing at Speed Avenue, North Pole

**4**    *Bliksem Deer*

a 10-year-old 4IR AI robot existing at Speed Avenue, North Pole

## **5    *Donner Deer***

a 2-year-old 5IR super-AI robot existing at Speed Avenue, North Pole (hereinafter referred to as “the Accused”) are guilty of the following offences:



## **INDICTMENT**

**COUNT 1:      CONDUCTING AN ENTERPRISE THROUGH A  
PATTERN OF RACKETEERING ACTIVITY**

Contravention of section 2(1)(e) read with sections 1, 2(2), 2(3), 2(4) and 3 of the Prevention of Organised Crime Act, 121 of 1998 (POCA)

**COUNT 2:      KIDNAPPING**

Guilty of the common law crime of kidnapping

**COUNT 3:      INTIMIDATION**

Contravention of section 1(1) of the Intimidation Act, 72 of 1982

**COUNT 4:      UNLAWFULLY SELLING, DISPENSING AND / OR  
DISTRIBUTING LIQUOR**

Contravention of Regulation 26(1) read with Regulations 1, 3, 4, 5, 26(2), 26(3), 26(4) and 31(2) of the Disaster Management Regulations (published under GN 480 in GG 43258 of 29 April 2020); further read with Government Gazette no. 43096 of 15 March 2020; further read with sections 1, 2, 3, 27, 59 and 65 of the Disaster Management Act, 57 of 2002; further read with sections 1(1) and 3 of the Adjustment of Fines Act, 101 of 1991

**COUNT 5:      FAILURE TO COMPLY WITH THE PROHIBITION ON  
ENTERING PLACES AND PREMISES CLOSED TO THE  
PUBLIC: NIGHTCLUBS**

Contravention of Regulation 24(2) read with Regulations 1, 3, 4, 5 and 61(1) of the Disaster Management Regulations (published under GN 480 in

GG 43258 of 29 April 2020); further read with Government Gazette no. 43096 of 15 March 2020; further read with sections 1, 2, 3, 27, 59 and 65 of the Disaster Management Act, 57 of 2002; further read with sections 1(1) and 3 the Adjustment of Fines Act, 101 of 1991

**COUNT 6: OPERATING A BUS SERVICE AND/OR TAXI AND/OR SLEIGH SERVICE FOR LONG DISTANCE TRAVEL EXCEEDING 70% OF THE LICENSED CAPACITY**

Contravention of Regulation 20(1)(a) read with Regulations 1, 3, 4, 5 and 61(1) of the Disaster Management Regulations (published under GN 480 in GG 43258 of 29 April 2020); further read with Government Gazette No. 43096 of 15 March 2020; further read with sections 1, 2, 3, 27, 59 and 65 of the Disaster Management Act, 57 of 2002; further read with sections 1(1) and 3 the Adjustment of Fines Act, 101 of 1991

In the event of a conviction the State requests sentence in accordance with the law against the Accused.

ADVOCATE HUGO DE GROOT SC  
DIRECTOR OF PUBLIC PROSECUTIONS  
GAUTENG LOCAL DIVISION: JOHANNESBURG

## GENERAL PREAMBLE TO CHARGES

Whereas the Accused acted in the course and execution of a common purpose by prior agreement and or active association, entered into on a date unknown to the State, which common purpose was maintained during at least the period 1 May 2020 to 31 July 2020 in an association of individuals as envisaged in section 1 of POCA to form an enterprise. If necessary, the State will, however, rely on the *actus reus* and *mens rea* of each individual Accused to prove the allegations;

The purpose of such enterprise was to sustain through a pattern of racketeering activities through the illegal acquisition of voluminous quantities of Pilsner beer from Brauhaus Riegele, Augsburg in the Federal Republic of Germany and the subsequent lucrative distribution thereof to various parts of the world under the guise of the deceptive and apparent innocent concept of "Christmas in July". The unlawful conduct of the Accused in specifically the Republic of South Africa will, however, provide this Honourable Court with the required territorial jurisdiction to adjudicate the charges preferred against the Accused;

The role of each individual Accused involved, but was not limited to, the following:

- Accused 1 provided access to international delivery locations largely due to his respected global image as a philanthropist and goodwill ambassador;
- Lending credibility through astute academic respectability, Accused 2 established through *inter alia* high level networking an intricate web of beer suppliers from the said Brauhaus Riegele, Augsburg, Germany;
- Accused 3, 4 and 5 provided a sophisticated transport system augmented by advanced robotics, artificial intelligence and virtual reality.

And whereas the South African Government declared the National State of Disaster on 9 April 2020 and pursuant thereto promulgated extensive regulations in terms of section 27 of the Disaster

Management Act, 57 of 2002 to contain the spread of COVID-19, which included *inter alia* a prohibition on the sale, dispensing and distribution of alcohol; a prohibition on entering night clubs; and the regulation of bus and or taxi services for long-distance travel;

And whereas the national prohibition on alcohol sales provided a substantial and desperate local demand for alcohol at any price and from whatever source, enabling the Accused to focus their enterprise and racketeering activities on the illegal sale and distribution of alcohol in South Africa with specific emphasis on the concept "Christmas in July";

The pattern of racketeering activities consisted of the planned, ongoing, continuous and repeated participation in the commission of various offences including contravention of the Disaster Management Regulations promulgated in terms of the Disaster Management Act, 57 of 2002, kidnapping and contravention of section 1(1) of the Intimidation Act 72 of 1982;

Now, therefore, the Accused are guilty of:

### **COUNT 1: CONTRAVENING SECTION 2(1)(e) OF POCA**

IN THAT upon or about the period 1 May 2020 to 31 July 2020 and at or near Augsburg in Germany and or Johannesburg in South Africa, the Accused whilst managing or employed by or associated with the enterprise defined above, merrily conducted or participated in the conduct, directly or indirectly of such enterprise's affairs through a pattern of racketeering activities, which acts set out in Counts 2 to 6 below.

### **COUNT 2: KIDNAPPING**

THAT THE Accused are guilty of Kidnapping

IN THAT during the period 1 May 2020 to 31 July 2020 and at or near Johannesburg in the Regional Division of Gauteng, the Accused unlawfully and intentionally deprived members of the Dean's Committee of the Law Faculty of the liberty of their movement in order

to derail their plans to establish a rival enterprise selling Zol and or to prevent them from revealing the affairs of the current enterprise and or to provide free and forced labour in the tasting, sorting, packing, advertising and delivery of beer at various premises and or to assist in the collection of payment, voluntary or otherwise, for such produce.

**COUNT 3: CONTRAVENING SECTION 1(1) OF THE INTIMIDATION ACT, 72 OF 1982**

THAT THE Accused are guilty of the offence of contravening section 1(1) of the Intimidation Act, 72 of 1982

IN THAT during the period 1 May 2020 to 31 July 2020 and at or near Johannesburg in the Regional Division of Gauteng the Accused, unlawfully and with the intention to compel members of the said Dean's Committee to abandon their resolve to establish a rival enterprise selling Zol, failing which, to expose the existence of the current enterprise, threatened to assault, injure, demote or cause damage to the name and reputation of the individual members of the said Committee.

**COUNT 4: FAILURE OF COMPLIANCE TO THE RESTRICTIONS ON THE SALE OF LIQUOR**

THAT THE Accused are guilty of the offence of contravening Regulation 26(1) read with Regulations 1, 3, 4, 5, 26(2), 26(3), 26(4) and 31(2) of the Disaster Management Regulations (published under GN 480 in GG 43258 of 29 April 2020); further read with Government Gazette No. 43096 of 15 March 2020; further read with sections 1, 2, 3, 27, 59 and 65 of the Disaster Management Act, 57 of 2002; further read with sections 1(1) and 3 the Adjustment of Fines Act, 101 of 1991.

IN THAT during the period 1 May 2020 to 31 July 2020 and at or near Johannesburg in the Regional Division of Gauteng the Accused, unlawfully and intentionally sold and or distributed and or transported liquor.

**COUNT 5: FAILURE TO COMPLY WITH THE PROHIBITION ON ENTERING PLACES AND PREMISES CLOSED TO THE PUBLIC: NIGHTCLUBS**

THAT THE Accused are guilty of the offence of contravening Regulation 24(2) read with Regulations 1, 3, 4, 5 and 31(2) of the Disaster Management Regulations (published under GN 480 in GG 43258 of 29 April 2020); further read with Government Gazette No. 43096 of 15 March 2020; further read with sections 1, 2, 3, 27, 59 and 65 of the Disaster Management Act, 57 of 2002; further read with sections 1(1) and 3 the Adjustment of Fines Act, 101 of 1991.

IN THAT during the period 1 May 2020 to 31 July 2020 and at or near Johannesburg in the Regional Division of Gauteng the Accused, unlawfully and intentionally entered various night clubs which were places or premises closed to the public, for purposes of enhancing and or promoting the business of the enterprise and or to do what people otherwise do in places of such nature, including, but not limited at all to, smoking Zol.

**COUNT 6: OPERATE A BUS SERVICE AND/OR TAXI SERVICE AND/OR SLEIGH FOR LONG DISTANCE TRAVEL EXCEEDING 70% OF THE LICENSED CAPACITY**

THAT THE Accused are guilty of the offence of contravening Regulation 20(1)(a) read with Regulations 1, 3, 4, 5 and 31(2) of the Disaster Management Regulations (published under GN 480 in GG 43258 of 29 April 2020); further read with Government Gazette No. 43096 of 15 March 2020; further read with sections 1, 2, 3, 27, 59 and 65 of the Disaster Management Act, 57 of 2002; further read with sections 1(1) and 3 the Adjustment of Fines Act, 101 of 1991.

IN THAT during the period 1 May 2020 to 31 July 2020 and at or near Johannesburg in the Regional Division of Gauteng the Accused, unlawfully and intentionally operated a bus service and/or taxi service and/or sleigh for long-distance travel on various occasions from Augsburg to Johannesburg and back and the bus and/or taxi and/or

sleigh carried more than 70% of the licensed capacity to wit 200% capacity.

### **SUMMARY OF SUBSTANTIAL FACTS**

The facts relevant to this matter have been set out in the general preamble and are therefore not repeated here.

### **LIST OF WITNESSES**

1. *Ms Santa Claus*

Speed Avenue, North Pole

2. *Doe Rednose*

Speed Avenue, North Pole

3. The names of further witnesses are being withheld in terms of section 144(3)(a)(ii) of Act 51 of 1977 for fear of intimidation.

4

*Merry Christmas!*  
*Terms and Conditions Apply*

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*Michele van Eck*

Mr ST Nicholas  
(also known as Santa Claus)  
No 1 cnr of Jolly & Cheer Streets  
The North Pole  
Alaska  
9277

20 December 2020

Dear Mr ST Nicholas,

**RE: LETTER OF DEMAND - NON-COMPLIANCE WITH  
THE SOUTH AFRICAN LEGISLATIVE FRAMEWORK**

By way of introduction, we act on behalf of a non-profit organisation established to fight for the protection of individuals in the South African consumer market (our client). Our client has requested that we address this letter to you based on your established business practices in the South African market and your continued failure to comply with the country's legislative framework.

We draw your attention to the Consumer Protection Act 68 of 2008 (CPA), which came into effect on 1 April 2011. As you should be aware, in terms of section 5(1), the CPA applies to the supply of all goods and services within the boundaries of South Africa for consideration. Your business does indeed supply goods to various consumers in South Africa, and your receipt of cookies and milk on the 25<sup>th</sup> of December



annually is evidence of sufficient consideration received for your services. As none of the exceptions found in section 5(2) of the CPA applies to you, it is evident that the CPA regulates the sale and/or supply and/or provision of goods to your customers within South Africa.

We do, however, note that you have attempted to contract out of obligations imposed on you by the CPA, by including the following provision in your standard terms and conditions:

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"Although we will do everything in our power to comply with applicable legislation, including the Consumer Protection Act 68 of 2008 (CPA), we will not be held responsible (and you hereby waive any claim you may have against us) for any intentional or unintentional breach of the CPA, whether such a breach is caused by the negligence, gross negligence, wilful misconduct or the like of our founder ST Nicholas, any props, animals used to support our business operations such as (but not limited to) reindeer, bears and other fur-like creatures, as well as any systems, infrastructure and use of third party logistics support services, including the automated enterprise logistics filing systems (ELFS) and any other processing systems."

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You are neither permitted to contract out of your responsibilities nor any rights that a consumer may be afforded under the CPA, which the abovementioned clause clearly attempts to do. This provision is expressly prohibited and invalid in terms of section 51 of the CPA. Therefore, we urge you to take the content of our letter seriously and remedy your non-compliance with the CPA as set out in this letter.

As part of your operations, we understand that your business solicits so-called orders in the form of customer 'wish lists' that are directed to your head office in the North Pole. Once orders are received by your automated enterprise logistics filing systems (known as ELFS) the origin of the order is identified and your customers' personal information is validated against your global database by the ELFS. After verification of your customers' identity, orders are processed based on whether the customer (often a minor) is on the 'naughty' or 'nice' list.

It is not exactly clear how the ELFS determine whether a customer should be placed on the 'naughty' or 'nice' list, however, it is evident that such a differentiation is not established from some objective measurable but is rather based on your personal preferences and/or observations of your customers good or bad conduct the preceding year.

In terms of section 8 of the CPA, you may not unfairly discriminate between customers based on a discriminatory ground as listed in Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 as well as section 9 of the Constitution. The CPA does, however, in terms of section 9(3) allow for some distinctions between the treatment of customers provided that it can be shown that the preference provided to the customer on the 'nice' list are firstly distinguishable from those customers found on the 'naughty' list and the general South African population. Secondly, that this distinction is intended to satisfy a specific need or interest that is unique to that particular group of customers found on the 'nice' list. There is no evidence that this exception applies to your business.

Our client finds it extremely disturbing that you would continue to differentiate between customers based on their status of being either good or bad and thereby group and place them on either the 'naughty' or 'nice' list. There is no clear indication or rationale for such a distinction, other than your observation of a person's conduct being either good or bad, which may very well be based on your judgment and/or personal approval or disapproval of your customers' lifestyle, morals, values and the like. We can, therefore, only conclude that your decision not to transact with customers on the so-called 'naughty' list is based on some unfair discriminatory reason and, therefore, must be a breach of section 8(2)(b) of the CPA. In fact, this very conduct is presumed to be unfair in terms of section 10(2)(a) of the CPA and we hereby call on you to provide tangible justification to show that such a distinction is reasonable and justifiable under the circumstances, failing which we reserve our client's rights to request the courts to compel you to do so.

We are also advised that if your customers find themselves, for some unfortunate reason, on the 'naughty' list then their orders are discarded, alternatively destroyed, alternatively ignored but their personal information is retained on your database. Those orders from customers that are fortunate enough to find themselves on the 'nice' list can expect to have their orders processed and fulfilled on the 25<sup>th</sup> of December. Unfortunately, your customers are only informed of whether their order would be fulfilled or not on the day of delivery.

Based on the retention of customers' personal information on your global database and the continued processing of this information by the ELFS, we also wish to draw your attention to the Protection of Personal Information Act 4 of 2013 ('POPIA'), which came into full force on 1 July 2020 and regulates the collection, storage, processing and destruction of personal information. It is clear that your business, and particularly the use of your ELFS, process your customers' personal information (which includes their names, surnames, age, gender, email addresses, physical addresses and postal addresses) in the form of collecting, storing, updating, modifying, amending and using your customers' personal information. Although you are *domiciled* in the North Pole Alaska, POPIA still applies to your business operations as you process information that is located in, or originates from South Africa via your ELFS, which can be described as an automatic processing system in terms of section 3(1) of POPIA.

We note that clause 16 of your standard terms and conditions confirms that you *"... warrant that any customers personal information which is disclosed to us will be processed in a manner that complies with the Protection of Personal Information Act 4 of 2013, and that all customers are expected to cooperate with us in good faith in the transfer and processing of their personal information"*. We have serious doubts as to whether your ELFS are adhering to the eight pillars of responsible and lawful information processing set out in section 4(1) of POPIA being: accountability, processing limitation, purpose specification, further processing limitations, information quality, openness, security safeguards and data subject participation. In this regard, we wish to stress that section 9 of POPIA requires that you must process your customers'

information lawfully so not to infringe on their privacy, and that section 10 requires that your customers' personal information may only be processed for a specific purpose that is relevant and not excessive. In this regard, section 18 of POPIA also requires that you take reasonably practical steps to ensure that your customers are made aware of the information that is being collected.

It is also evident that many of your customers are minors, being individuals younger than eighteen years of age, and in terms of sections 11(1)(a) 34, and 35(1)(a) of POPIA you are not permitted to process their information without the consent of the responsible person of the minor in question. It is clear that neither yourself nor your ELFS solicits such consent from those responsible parties of your minor customers.

We are directed to demand from you, which we hereby do, your immediate compliance with the provisions of the CPA and POPIA as highlighted in this letter, and require that you present to us a confirmation of compliance by the 25<sup>th</sup> of December 2020, failing which we may (amongst other things) direct our client to approach the National Consumer Tribunal, the National Consumer Commission, the courts or any other dispute resolution structure permitted by law. We, therefore, would urge you to take the content of this letter seriously and trust that this matter will be resolved without resorting to such extreme measures, especially over the Festive season.

Wishing you a very merry Christmas, and again reiterate that all of our client's rights remain strictly reserved.

Yours faithfully,

Signed electronically (in terms of section 13 of the Electronic Communications and Transactions Act 25 of 2002)

**Mr. George Scrooge**

Admitted Attorney of the High Court of South Africa

Partner at:

Scrooge, Penny, Pinched & Associates Inc.

# 5

## *Opinion Re: Use of Santa Paws in the Western Cape*

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*Wim Alberts*

Dear Santa

I refer to our recent consultation.

I confirm the factual situation that an entity is conducting business at the Waterfront in Cape Town, delivering gifts using the name Santa Claus. Furthermore, customers at the shop are welcomed by a Santa-like figure shouting "Ho Ho Ho". The entity also sells plastic figures with your likeness, bearing the name Santa Claus. They have a branch in Stellenbosch delivering playthings to pets under the name Santa Paws. They have another branch in George delivering toys to birds under the name Santa Claws.

Your legal position is as follows.

### *1. Use of Santa Claus*

I discuss below the various relevant remedies.

#### *(a) Passing off*

In *Jennifer Williams & Associates & Another v Life Line Southern Transvaal* 1996 (3) SA 408 (A) at 418 D - G the court has defined passing-off as:

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"A species of wrongful competition in trade or business. In its classic form it usually consists in A representing, either expressly or impliedly (but almost invariably by the latter means), that the

goods or services marketed by him emanate in the course of business from B or that there is an association between such goods or services and the business conducted by B. Such conduct is treated by the law as being wrongful because it results, or is calculated to result, in the improper filching of another's trade and/or in an improper infringement of his goodwill and/or in causing injury to that other's trade reputation. Such a representation may be made impliedly by A adopting a trade name or get-up or mark for his goods which so resembles B's name or get-up or mark as to lead the public to be confused or to be deceived into thinking that A's goods or services emanate from B or that there is the association between them referred to above."

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In practice, it is accepted that underlying the action of the plaintiff is proof of the existence of a reputation in the relevant jurisdiction. In this case, it is the position about the Western Cape High court. You are of course, because of your long and extensive use of the title Santa Claus, famous in South Africa, and thus also in the Cape. Concerning confusion, one can merely note that the same mark is used about the same activity. We thus conclude that passing off would be a viable remedy to protect your rights. Because of your extensive reputation in both the name and appearance, our conclusion would also apply to the sale of Santa Claus figures.

(b) Section 34(1)(a) of the Trade Marks Act

This provision reads as follows:

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"The rights acquired by registration of a trade mark shall be infringed by-

(a) the unauthorized use in the course of trade in relation to goods or services in respect of which the trade mark is registered, of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion;"

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We note from our records that your mark was registered in 1916, so the registration is more than 100 years old. The specifications are

“Transport services in relation to the delivery of toys”. Incidentally, this is a rather narrow description and I would suggest that we file for transport services as such. This would give you wider protection. In the current context, the marks are the same and the activity is the same. We are thus certain that you will be able to rely on this ground.

Also of a likewise application is section 35(3) of the Trade Marks Act which reads as follows:

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“(3) The proprietor of a trade mark which is entitled to protection under the Paris Convention as a well-known trade mark is entitled to restrain the use in the Republic of a trade mark which constitutes, or the essential part of which constitutes, a reproduction, imitation or translation of the well-known trade mark in relation to goods or services which are identical or similar to the goods or services in respect of which the trade mark is well known and where the use is likely to cause deception or confusion.”

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(c) Section 34(1)(b) of the Trade Marks Act

This provision reads as follows:

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“The rights acquired by registration of a trade mark shall be infringed by-

(b) the unauthorized use of a mark which is identical or similar to the trade mark registered, in the course of trade in relation to goods or services which are so similar to the goods or services in respect of which the trade mark is registered, that in such use there exists the likelihood of deception or confusion;”

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The question in this regard is whether the retail services of the other side are similar to your registration. In the leading case of *British Sugar Plc v James Robertson & Sons Ltd* [1996] RPC 281 the following factors were mentioned:

- particular consumers
- particular products
- trade channels

- found on same supermarket shelves?
- are products in competition?

In our estimation, the retail services are similar. We would, however, suggest that you file applications for retail services as well as for toys.

(d) Section 34(1)(c) of the Trade Marks Act

This provision reads as follows:

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"The rights acquired by registration of a trade mark shall be infringed by-

(c) the unauthorized use in the course of trade in relation to any goods or services of a mark which is identical or similar to a trade mark registered, if such trade mark is well known in the Republic and the use of the said mark would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of confusion or deception..."

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As mentioned above, we consider your mark to be well-known. Therefore, you will qualify for protection in terms of the above provision, as it relates to *any* goods or services. This implies that both the delivery service in Cape Town and the retail of Santa Claus figures can be enjoined.

## 2. *Use of Santa Paws/Santa Claws*

It was said in *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* [2005] ZACC 7 par 78 that:

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"Parody is appropriation and imitation, but of a kind involving a deliberate dislocation. Above all, parody presumes the authority and currency of the object work or form. It keeps the image of the original in the eye of the beholder and relies on the ability of the audience to recognise, with whatever degree of precision, the parodied work or text, and to interpret or 'decode' the allusion; in this sense the audience shares in a variety of ways the creation



of the parody with the parodist. Unlike the plagiarist whose intention is to deceive, the parodist relies on the audience's awareness of the target work or genre; in turn, the complicity of the audience is a sine qua non of its enjoyment.

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As Gredley and Maniatis write:

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"The effect on the audience of parodic dislocation is often comic, provoking laughter, not necessarily at the expense of the parodied work or its author, but at the dislocation itself. Other reactions can include shock, disgust, anger or even simply intellectual pleasure at the recognition of the object work and at the skill and imagination of the parodist. . . [It may be suggested] that the courts are prepared to tolerate genuine parody, especially in cases where the sole or primary injury to the copyright owner is to his amour propre."

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The tenor of the judgment is to protect humorous expressions. For this reason, I believe we would not be able to prevent the use of the captioned names.

### 3. *Use of Ho Ho Ho*

The only manner in which the above can be protected is to file a trade mark application for it. The following definition is pertinent then:

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"'mark" means any sign *capable of being represented graphically*, including a device, name, signature, word, letter, numeral, shape, configuration, pattern, ornamentation, colour or container for goods or any combination of the aforementioned;"

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The part emphasised is problematic. Protection is arguably available in terms of the common law for the words Ho Ho Ho. However, I would suggest that we file a trade mark application to protect it. We shall lodge a musical annotation for the sound.

#### 4. *Attack on your registration*

I set out below the definition of "trade mark" in section 1 of the Act:

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"trade mark", other than a certification trade mark or a collective trade mark, means a mark used or proposed to be used by a person in relation to goods or services for the purpose of distinguishing the goods or services in relation to which the mark is used or proposed to be used from the same kind of goods or services connected *in the course of trade* with any other person"

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The part emphasized can, arguably, be problematic for you as you do not conduct trade, as per the concept of *trade* mark. However, the common law courts have protected the names of churches, welfare organisations, schools, political parties, and not-for-profit entities. Seemingly, the idea is to protect their goodwill in a broad sense. The Registrar is likely to follow the guidance of the courts. Everything considered, thus, I feel we would be able to overcome such an attack.

#### 5. *Conclusion*

In conclusion, I am confident that we would prevail in any litigation. The other side has been trading for about eight months, building on your name. In principle, you could thus claim damages. However, an alternative might be to require them to donate gifts to the Red Cross' Children Hospital.

I look forward to hearing from you regarding the launch of proceedings, following the sending of a letter of demand.

RW ALBERTS  
UJ Law Clinic

## 6

### *A Threat to National Security or Making Merry: Rudolph the Reindeer in the Kudumane Magistrate's Court*

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*Jentley Lenong*

I am the descendant of the Barolong, Bafokeng, and Bakwena clans. My ancestors raised Kaditshwene from the dust of this land and forged a capital second to none. My people were once exceptional beyond measure, but not anymore. Now I am just known as Vaalis, the grey Donkey calling Mothibistad my home. Mothibistad is a slow-paced town as grey as I am. You would excuse me for desiring to believe that I perfectly fit into this town, where I am camouflaged by its hoary aesthetics. I dream of leaving this place one day and with my departure to rid myself of the burden of its locality, which weighs on my back like the black cross draped over my back hairs.

"A donkey's mind is always at the crossroads!" My mother – Mabatho, loved to remind me.

"... not knowing whether to turn left or right, go forward or return to where it is, we came from, that's why standing still makes the most sense at least most of the time," I recall her words.

"It is for this reason that we bear the cross on our backs," I remember my Mabatho braying at me.

Reverend Hyena once remarked that donkeys possess the Christ personality - in that we are calm and not quick to judgment. However, generally, people characterize us as just 'lazy *phologolo*' (meaning 'lazy animals'). I am not lazy!

One day I will be a lawyer and leave this place and not any ordinary lawyer. I will be like Bizos, the Great Rhino of the Griquas. It is such a pity that I could never see Bizos in action, litigating in the great halls of Thaba ya Batswana. I heard stories of his valour and his constant conquest plotting legal mind, coupled with knife-edge sharp argumentative skills. It is said that Bizos the Great Rhino, was like a warrior in the courtroom and could convince even the most stubborn of Great Eagle-owls. The Great Eagle-owls were notoriously known as strict legal positivists, but Bizos could alter their minds with a feathered tone voice and a slack piece of legislation. I too will be such a Great legal mind - Vaalis the Great Grey Donkey of Mothibistad! I will be draped in a black toga and command Thaba ya Batswana's halls of justice with wit and intellectual vigour, like the great *phologolo* jurist of old. Like Langa, Mokgoro, Cameron and Moseneke, the foundational thinkers of our jurisprudence. However, they wore green togas... A green toga might look silly on me. Other *phologolo* will just tease me in any case for looking like a relic in a dress. However, I am digressing.

This story is not about me, although from me. This is the story about a visitor from a world far removed from my own. A world only known to travellers, intellectuals and dreamers. This story is about Rudolph the Reindeer and how he become the most infamous *phologolo* across the whole Kudumane region.

I vividly remember how the whole town was an uproar over the court appearance of the foreigner from the North-pole. One could not make sense of the veracity of the story and I thought by going to court, I could clear up some of the confusion for myself. There were just too many versions of the events which led up to the court appearance, making the rounds in Mothibistad.

"The whole thing is just blasphemous, I tell you! How can a donkey be the messiah? Descending from heaven with a golden chariot? No, I tell you, this is blasphemy!" I heard from reverend Hyena, whiles tucking his tail between his legs as he slowly kept walking away from me.

"This is bad business, dark and bad business, Vaalis. I suspect those bloody turkeys from QwaQwa. I tell you." I heard Kuku the Chicken who owns the vegetable stall on the corner of the police station, say.

"Kalakune, ba yea loaja... (meaning, 'these turkeys are witches...') that red-nosed donkey is one of their creations. Have you seen that weird red thing hanging over their beaks? Birds of a feather, birds of a feather." I recall Kuku's words uttered in her typical clucking voice.

In turn, Turkey - the local traditional sage blamed the donkeys.

"If it looks like a donkey, walks like a donkey and pulls a cart like a donkey. Then by God, it is mos a donkey!" Turkey gobbled at me.

"I'm sure that this is just another plot from another darn donkey to get out of doing an honest day's work," Turkey shouted at me while I walked away.

This is a commonly held perception of donkeys - that we are known to be lazy, but this is not true. I prefer to think that we live more in our heads than outside in the world, probably because of my Mabatho's views. Donkeys are thinkers and we are not much interested in activities, but when we work, we work with a single focus. I even remember the day I realized for the first time that I was a donkey. It was the day of the Great Rainbow Unity celebrations.

The prophecy of Credo the Wise had finally come to floatation. He was also known as Vusamazulu - the awakener of the Zulu-nation and a descendant of Mutwa. Credo the Wise was one of the last Great Leopards. These Great Leopards stood almost as tall as horses. Credo the Wise was no different, a feline-like no other, draped in the spotted patterns of the Kalahari landscape. It is told that the elegance of their stride appeared as if it was the ground which glided underneath their feet. Credo the Wise lived in the time when all *phologolo* nations were enslaved by Kwena, the Crocodile of Wilderness. Only Kwena and his supporters enjoyed the riches of the land and the rest of the *phologolo* nations were left starving and enslaved. It is said that Credo the Wise foretold of a Great Elephant descending from the hills of Mvezo called - Ndlovu. Ndlovu would cross the boundless waters of iColoni, where

he would battle Kwena. The battle would last for 27 years, after which Ndlovu would defeat Kwena. After this titanic battle, Ndlovu would be faced with two choices. He could either take Kwena's jaw from his mouth and crush all his followers and sympathisers or wait for the great rainbow ribbon. Credo the Wise prophesied that the great rainbow ribbon will fall from the heavens and the *phologolo* will run from their homes in countless meandering lines to elect Ndlovu as their leader. Were Ndlovu to take up the great rainbow ribbon he would unite the *phologolo* nations under an epic rainbow of prosperity for the first time. Now, in my lifetime, Ndlovu the Great Elephant of Qunu had emerged victorious against Kwena!

And so, it came that all of the *phologolo* nations gathered together for the Great Rainbow Unity celebrations in the capital - Kaditshwene. This was my first time outside of my village - Hotazel, I haven't even been to our town - Mothibistad, as yet at that time. I was a one-year-old foal who never left my mother's side and everybody in my little village just outside of Mothibistad were also all donkeys. My mother wanted us to quench our thirst from the long journey before we gathered with the crowds under the Great Union-Tree. As we walked along the path a truck full of rowdy *phologolo* approached us.

"Hey, you dirty donkeys! Go back to where you came from. You lazy animals would never be able to run our country!" The truck full of what I later discovered was Kwena's supporters shouted at us.

I was confused and rattled. Why would these strangers hate me so much even though they don't know me at all? I looked upwards to my mother. She pulled me to her side with her gracious neck and raised her head as if she was proud to be insulted and we proceeded to the waterhole.

Before us, I was greeted by a vast landscape roofed with *phologolo* and in front of them all, I saw an even greater body of water, glistening in the morning sun. I have never before seen such a diversity of *phologolo* in my life. As we walked up to the watering hole, pushing through the crowds of thirsty *phologolo*, I took a glance at my mother still shaken and confused by the earlier incident. When we finally made it to the

water's edge, I decided that I will not drink my mother's milk anymore. I lowered my head in the same manner, I saw her do hundreds of times before. Then I saw myself for the first-time reflected right next to my mother in the waters. Instead of taking a sip, I raised my head proudly, like she did earlier and that was the moment I realised that I was a donkey. However, my donkey brain digresses again.

The most reliable version of the events that led to the capture and arrest of Rudolph the Reindeer, came from Zion the Eagle - the most famous and revered journalist throughout the Kudumane region. Zion published a news article in the Mothibistad Daily Post titled 'Donderweer Donkey brings a dark cloud to Hotazel'. The news article started with the words "On the evening of the 14th of December, a strange object was observed over the skies of the village - Hotazel ...". The news article went on to describe how the flying object crashed into the corrugated steel shack of Matlakala Vastrap - a local donkey from Hotazel. According to Mr Vastrap, to whom I can safely refer as 'a particularly well-known inebriated intellectual from the village', he was busy relaxing inside his "...domicile" with a carton of Chibuku, when the events unfolded. Locals refer to Chibuku colloquially as shake-shake, because of the elaborate ritual of shaking the drink into submission before consumption. Chibuku is a particularly potent alcoholic local brew that seems to attack the knees of the converted faster than their heads. This I can attest to from my observations every weekend over the years and weekends continue to be a fountain of empirically evidences on this subject.

"A vagrant donkey crashed through my *plafond*, in what I can only presume to be an impertinence and a vulgar attempt at the extraction of my most prized valuables." Mr Vastrap was quoted.

"If it wasn't for my wits and prompt corporeal action, I tell you - I would have been robbed blind" Zion reported Vastrap's words.

"Don't you have something for the shock, *monna* (meaning 'man')?" Zion quoted Vastrap's departing request to him.

The police were dispatched promptly and oddly found what appeared to be a donkey with horns inside the shack, according to the news

article. The strange-looking donkey was hauling a donkey cart and what was even more strange was its missing wheels.

"...to me this looks like a typical case of drinking and driving or driving under the influence of alcohol! This bloody donkey must have driven so fast that he hit a rock or something and flew through the air to eventually crash into this *letagwa's* (meaning 'drunk') shack." One of the first police officers on the scene related his observations.

"This is open and shut case *monna!*" Another police officer's remarks were quoted.

According to the news article, Vastrap made it clear that he will sue Rudolph for malicious damage to property, which included - the litre of Chibuku, spilt during his ordeal. What was further baffling about this case, was that the strange-looking donkey had no injuries from the crash. This became the subject of much speculation preceding Rudolph's court appearance. Zion further reported that after statements were taken from the strange-looking donkey, he claimed to be reindeer going by the name of Rudolph - the reindeer. The peculiarity of this case led to widespread national interests. A special investigating unit - the Priority Crimes Litigation Unit was dispatched from the capital to investigate the matter and to shed light on this case. In the days preceding the court appearance of Rudolph, the dusty streets of Mothibistad never knew such turmoil. For weeks the media and the streets were ablaze with gossip about the story and every conversation would eventually lead to it.

Finally, the day of Rudolph's court appearance arrived. I made my way early to the court knowing that there will be a scuffle for seats inside the courtroom and I dare not miss out on these proceedings. As I hurriedly made my way down the final stretch of the avenue towards the courtroom, there it was again – smeared across a light pole like tar on wood - "Did Xmas come early? Rudolph in court!". As I tried to make sense of what Xmas meant, a chicken bumped into me trying to cross the road. And suddenly the blue lights and black cars of the Priority Crimes Litigation Unit followed, which were just as spectacular and mystifying as the story that brought them there. As I increased my



pace, I read the following light pole headline, "Unidentified flying object or just tossing donkey dung?". A thought jumped into my head – I hope *phologolo* would not think that I came out in support of this reckless donkey. Somehow the insults from the Rainbow Unity celebrations got hold of me again. I quickly reasserted myself in the posture of my dearest mother. For a moment I felt great shame for my demonstration of donkey self-hate.

"I am proud to be a donkey!" I said to myself out loud, as I realised that I was standing still in the middle of the road. I quickly asserted myself and marched upright to the steps of the courtroom.

Upon entering the courtroom, it was abuzz with chatter as everybody anxiously awaited the emergences of Rudolph the reindeer.

"They say he's a cross between a donkey and a kudu..." A voice appeared behind me.

"They say the donkey has 5G antennas strapped to his head..." Another voice tucked attention from my right.

"He is probably involved with that revolution of Marwala, the Rhino of Thohoyandou. It's a nasty artificial business which that rhino is caught up in - I tell you." A blesbok expressed his position while shifting and studying the positioning of his horns relative to the kudu next to him.

"Apparently, he landed on his nose in the accident. It's the only injury he picked up - an inflamed nose." Another remarked from behind me.

"Weird!" The reply came.

"Attention! Attention! All rise in this esteemed court for the Honourable Magistrate Janotto, the last Great Eagle-owl." The orderly commanded all present in the courtroom.

Steadily and already in contemplation, in-walked Magistrate Janotto. With a fixed gaze at the prosecutor, he pulled his chair back and in one sweeping motion spread his perpetually stretching wings and reclined into his chair. For a moment his wingspread seemed to ever so slightly darken the court as if the sun retreated behind a dark cloud.

"Be seated!" Magistrate Janotto's voice bellowed across the courtroom.

"Where is the accused?" He followed up in a more inquisitive tone.

"There was a slight delay with the transport to the court, Your Worship. The accused will be before the court momentarily my Lordship." The orderly jumped up in reply.

"Well, we don't have all day let them produce the accused if it's already in the building." The magistrate demanded whilst visibly irritated.

The murmur and tension in the courtroom were so palatable, nobody heard Rudolph emerging up the staircase from the bottom of the holding cells. Suddenly, everybody went quiet as his majestic horns were the first to appear into the room. Everybody's eyes fell in the direction of the accused bench as a heavy thick furred beast ascended into our midst. In what seemed like the suspension of time, all present had their jaws dropped, whilst remaining fixated on this odd-looking donkey. The gavel of the magistrate snapped us all back to the present.

"This is case number 2512 Your Worship. In the matter of the State versus Rudolph the reindeer." The orderly hollered with his chest pointed to the sky.

"Proceed!" Magistrate Janotto commanded with glistening eyes on the prosecutor.

"The accused faces the charges of crimes against the State, including national and international terrorism..." Meerkat the prosecutor proceeded to read out the charge-sheet. "...in that the accused admitted to illegally entering the sovereign territories of not only our beloved state but countless others across the globe, Your Worship. The accused admitted to being in the habit of entering the homes of unsuspecting citizens across the globe seeking out their children. This time around, the intelligence that was provided to the accused - my Crown, was tainted. The accused sought to enter the home of one Matlakala Vastrap, seeking chimney and child, but was left to find a dump and a drunk..." Meerkat narrated to the court.

"...The accused has further admitted Your Worship to being assisted by an accomplice – one Santa. According to the version of the accused this individual is seemingly the alleged employer of the accused. In the version of the accused my Nduna, their reign of terror started as far back as Pagan times. The accused alleges that the customary law of all civilised nations deems this intrusion to not only be legal but a necessary terror for all good children around the globe. Consequently, in the version of the accused, the only way our dear babies can escape this terror of a horned donkey and the bearded assailant is to be naughty throughout the year." Meerkat paused and seemed to rest after a flurry of words. This brought us all into a state of contemplation.

I could feel the mood in the courtroom shifting from excitement and curiosity to contemplation and contempt.

"Further my Crown, the accused needs to answer to a charge of contravention of the Intelligence Services Act 65 of 2002..."

"...in that the accused admitted to having a database of names of all the children of the world, my Lordship. The accused has also been unwilling to share this information with this esteemed court, Your Worship." Meerkat pandered towards Magistrate Janotto.

"Finally, Your Worship the state will prove that this donkey contravened the Civil Aviation Regulations of 1997, which were issued under section 22 of the Aviation Act, 74 of 1962, which was then repealed by the Civil Aviation Act 13 of 2009'..." Meerkat placed the whole court into a cognitive referencing tailspin.

"... in that the accused deployed unknown, but it is suspected to be Fourth Industrial Revolution capable technologies to illegally and with a total disregard for *phologolo*-life, fly a drone-donkey-cart through the celestial skies of this great sovereign nation. I thank you, my Crown." Meerkat retreated into his chair.

"Your Worship, my client is not a donkey!" Vlakvark, Rudolph's state-appointed defence attorney objected.

"My apologies Your Worship, this kudu contravened the Civil Aviation Regulations..." Meerkat sarcastically conceded.

"Your Worship! My client is neither kudu nor donkey. My client is eeeh... eish. Reindeer, Your Worship! Please protect him from the slender emanating from the prosecution." The youthful and plump Vlakvark replied.

"What is wrong with donkeys and what do kudas have to do with it?" I turned to Madam Peacock who was visibly intrigued by all the courtroom drama. The back-and-forth for a moment made me drowsy and I dozed off.

"Shush, I'm listening!" Madam Peacock snapped at me irritated by my interruption.

"What about my humble abode? What about me - the protagonists?" Vastrap startled all in attendance with his exclamation. Visibly being himself, by wobbling around seeking to steady his side of a continuously accelerating orbiting earth. Surprisingly, the magistrate did not reprimand him but launched his piercing eyes in the direction of Meerkat.

"Your Worship, the State has abandoned the charges of malicious damages to property. The State could not obtain a plausible affidavit from the victim, due to Mr Vastrap's allergy of sobriety." Meerkat replied and the court erupted in laughter.

"Noted. Now proceed." The magistrate stated with a frown.

"...Your Worship the accused was apprehended whilst hauling a donkey cart without wheels. A matter still to be explained to the State." Meerkat continued.

"It was a sleigh your worship!" Vlakvark replied.

"...a sleigh?" The magistrate repeated in a confused tone.

"What is a sleigh and how is it different from a donkey cart?" Magistrate Janotto prodded at the issue.

"I think it's the absence of wheels, my Crown." Vlakvark ventured to reply.

"You think, let me then rather hear from the accused himself... You think..." Magistrate Janotto lowered his voice and his head while keeping his eyes steadily fixed on Vlakvark.

Rudolph rose from the stretched-out hardwood bench and turned to Vlakvark with a nod. Vlakvark immediately retreated into his seat and gestured to Rudolph to proceed.

"I am Rudolph the reindeer, colloquially known as Rudolph the red-nosed reindeer!" Rudolph commenced.

"I am a loyal employee of Santa from time immemorial." He continued.

"Please state the full name of your employer, Mr Rudolph" Magistrate Janotto interceded.

"Oh, Santa Claus, Your Honour." Rudolph replied nervously.

"It is unfortunate and regrettable that I am in the situation in which I find myself today. I decided for my holiday to visit the South-Pole and seemed to have run out of magic across the hot and humid Northern Cape skies of your country. Even though I'm not one hundred percent sure as to what the cause of my almost catastrophic descent was, I do know that no malice was intended with my untimely presence in your country. It is not normal for both myself and my employer to visit the homes of children in these barren lands. However, I do know that children from the northern hemisphere - where I'm beyond fiction, have settled amongst your people and conveyed the stories of both my employer and me to them before." Rudolph remarked to a captivated audience around him.

"Mr Rudolph, what is this magic that you talk of? Surely, you do not want to convince this court that you possess supernatural powers." Meerkat interjected.

"Magic is more of a belief than a power my friend. I believe that I can fly and therefore I fly." Rudolph resigned himself to this answer.

"What technology allows you this extraordinary power to defy the laws of gravity in your opinion as a donkey... eeeh kudu, no reindeer, right? Are you a member of the Marwala cult, Mr Rudolph? Is this an

elaborate plot to demonstrate these demon-like technologies to our unsuspecting *phologolo*-public?" Meerkat exulted whilst propelling himself in the direction of Rudolph.

"I'm not a member of any cult, surely my identity is not at issue. Afterall Your Worship, I am the most famous reindeer of all. I was even immortalised in song by the great musical group - The Temptations." Rudolph implored Magistrate Janotto.

Suddenly the courtroom's doors flung open and in marched two ostriches wearing dark sunglasses. I saw one holding up a letter to the magistrate. Magistrate Janotto stretched out his left-wing and halted them almost a metre away from the magistrate's bench.

"What is the meaning of this disruption?" Magistrate Janotto bellowed whilst using his right-wing to adjust his glasses.

"It's a matter of national security, Your Worship." One of the ostriches uttered in a soldier-like tone.

Magistrate Janotto retrieved the letter from the ostrich and in one swift movement flattened it open on his desk. A murmur erupted in the courtroom. And without lifting his eyes off the page, the Great Eagle-owl slammed his gavel and commanded order. It was one strike and the whole courtroom was silenced. All eyes were fixed onto Magistrate Janotto, except mine.

My attention was drawn to a shady figure just outside the courtroom doors. All I could make out was his red coat and grey beard. I could swear I saw Credo the Wise standing next to him just outside the doorway of the courtroom. Then I saw, Credo the Wise enter the courtroom and truly it was as if the floor of the courtroom was moving and he was gliding across to room to right in front of the magistrate's bench. I was captivated and totally in a trance. The majestic great beast rested its head on the state coat of arms, engraved at the centre of the bench. A tear descended from his left eye and my eyes followed it as it down the pathway of his cheek as it dropped to the ground. It felt like a cleansing of my soul, a comfort of some sorts. I was ripped back

to reality by the slamming of the gavel under the wing of Magistrate Janotto.

"I guess, all animals are equal, but some animals are more equal than others." The Great Eagle-owl said in a defeated tone.

"Mr Rudolph, you are free to go, and this is the end of this matter. As a matter of national security, you will be accompanying these two ostriches who will return you to your sleigh."

As Rudolph disappeared down the staircase leading to the holding cells and where the eerie grey-bearded figure in the red coat awaited him, I knew that I would never see him again. However, previously his mythical mystery was a reality only to travellers, academics and intellectuals, but not anymore. Rudolph was no longer their story alone and as he vanished down the staircase, the appearance of Rudolph the reindeer in the Kudumane Magistrate's Court again returned him to another story, but this time it was our story.

## *Would it have been the Proverbial Hobson's Choice for Santa: The Gun or the Fire?*

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*Sipho Nkosi*

### *1. Introduction*

Had South Africa not been a constitutional democracy, Santa Claus would have had a difficult choice to make: between being burnt at the stake or facing a ferocious and merciless firing squad. This is because there are many South African laws and regulations that he has been contravening since he arrived in the country. This is the gentleman whose other moniker is 'Saint Nicholas'. As you know, he is of Greek parentage but a native of the far northern hemisphere (Iceland?). He was even a venerated bishop in his previous incarnation, always in a cassock and a mitre for a head-dress. The likes of him, in that ice-caked homeland of his - whose names are prefixed by 'saint' - are treated like demi-gods or angelic figures. According to urban legend, they, from time to time, have real 'face time' with God, in the flesh, who regales them with eschatological anecdotes, about death, the heavens, hell, purgatory, redemption and absolution. He came to South Africa as a sojourner, like many before him have done. But, he found the weather and climate quite different from what he is used to back at home; and that the country is abundantly endowed with mineral and natural resources. He then decided to linger – for a while longer. He also got to find out about *ubuntu* – the sub-Saharan African tradition that emphasises the interconnectedness of humanity. It is exemplified in our common greeting, '*Sawubona*', which, at a deeper level, means, "In



you, I see myself – a human being.” No reference to race, religion or place of origin.

## 2. *Of grapes, animals and cars*

As will be shown below, Santa knows biblical texts like the back of his hand; the provisions of the Constitution drop off his tongue with relative ease. Towards the end of last year (2019), when he arrived in South Africa, he bought a very fertile vineyard, of massive acreage. He invited a lot of black and coloured people from around the area to come and work for him. He also purchased a large tea estate in the far-northern part of the Limpopo Province. As the prudent man of the cloth that he once was, he bought all the relevant books on South African law, particularly Constitutional Law and Administrative Law. He also acquainted himself with all the important institutions of the country, and the senior functionaries working there. His first brush with the *law* of this country involved “driving a motor vehicle on a public road, recklessly and/or without due consideration for other road-users or their property” and ignoring road signs or markings. He disposed of the matter like a seasoned legal counsel. His defence was that, on the day in question, he was on his way to fetch one of his employees who was gravely ill. He *needed* to do it.

The second one related to contravening the provisions of sections 4 and 5 of the Drugs and Drug Trafficking Act 140 of 1992 in that he “cultivated, sold and/or distributed dagga to members of the public”. This is because, the charge-sheet read, there were seedlings planted and/or growing in the field, among the vines. In his defence, Santa argued that he thought that what was growing among the vines was – as told to him by his workers - *umhlonyane* (an indigenous remedy scientifically known as *Artemisia afra*) which, together with *Hydroxychloroquine*, is being touted as one of the possible remedies for the Covid-19 (Corona) virus; and could help generate a lot of revenue for South Africa. He further argued that, even if the seedlings found among the vines were dagga, (1) they were about 100 in number, and shorter than 15 cm, at the time of his arrest; (2) what was also found in one of the warehouses, already harvested, did not exceed

1200g; and two other people were living with him in the 'main house', (3) and that 50 other people were living on the wine estate (thus making the worker-plant ratio 1:2, assuming that the workers intended to use the plants for any other, 'illegitimate', purpose). He reminded the court that he was a man of God (though not wearing the dog-collar or professing any particular religion anymore) and that it was not his intention to break the laws of the country, much less deal in drugs of whatever kind.

### 3. *Language, lawyering and lawyering up*

The third case was almost on all fours with the second one. Alongside the rows of plants on his tea estate, in Limpopo, were rows of dagga plants. For that reason, he was charged with possession of, and/or dealing in, drugs, namely dagga. He raised a somewhat similar defence as he did in respect of the second one: that he had no intention of dealing in dagga; and that he thought that the plants were *morogo* (African spinach) which, his workers had advised, was very good and nutritious, as a relish.

The fourth case, involved three traffic offences: (a) exceeding the stipulated speed limit along the N1-south, a public road, at about 17h00, at or near the Hex River Valley in the Western Cape; (b) ignoring a road traffic sign and/or marking, namely, a "yield" sign, and (c) stopping to feed animals in the area, in contravention of another road sign. He spent a night in the police cells and appeared in court the following morning. In respect of (a), Santa conceded that he had exceeded the speed limit, but contended that he only realised that when the results of the speed-testing device (speed-trap) were shown to him, in court. He also challenged the efficacy of the device itself and the correctness of its reading. In addition, he argued that the paint on the road had faded to the point of near-invisibility. With regard to (b), he argued that the road sign/marking on that stretch of road, including the one under consideration, had faded and were not visible. Santa also stressed that the signs and/markings were not painted or erected, as the case may be, in accordance with the Regulations - made under the National Road Traffic Act 93 of 1996 - in that they were not hoisted

to the stipulated height or calibrated in the right size, height, length, font and/or colour. When it came to (c) he said that the wording on the road sign was vague at best, and confusing at worst. He contended that the words on the supposedly green-and-white board (road-sign) - "stopping and feeding of animals prohibited" - were open to, at least, two interpretations: (1) only stopping the car to feed the animals was prohibited; (2) but feeding the animals whilst the car was in motion was permitted. He further indicated that when the traffic officers emerged from the nearby bushes to stop him, he was, indeed, still feeding the animals, but that the wheels of his car were still rolling.

There is still another case pending against Santa Claus. He is due to appear in the Randburg Magistrate's Court, Johannesburg, on the 30<sup>th</sup> of November 2020 on a charge of fraud and theft. The allegation is that he misappropriated the funds that were entrusted to him by the Parish Pastoral Council of his church (in Northcliff), of which he is a member and chairperson. As a result, the parish priest could not account, fully, to the bishop of the diocese when called upon to do so. It is important to note that he is still awaiting the response of the National Director of Prosecutions (NDP) to his written submissions on the last-mentioned matter. Among the points that Santa has raised in that submission is that (1) there has been an undue and unfair splitting of the charges, which could result in an unfair trial and outcome; (2) the facts alleged in the charge-sheet, by the State, cannot even sustain the alleged offence of theft (ordinarily a competent verdict in these circumstances), and (3) that despite his alleged accomplices already serving their sentences, the amount mentioned in the charge-sheet remains unchanged, which could be prejudicial and detrimental to him; (4) and that the facts point to the alleged crimes having been part of the same criminal enterprise, committed with the same intent. In sum, he contends that he has not committed the alleged offences; and that if the matter were to 'go to trial', he would plead 'not guilty'. Of course, he expects the NDP - or any person delegated by her - to act without fear, favour or prejudice, in discharging her constitutional and statutory duties in this regard.

It is still a miracle – of biblical proportions - why Santa has not been arrested for contravening the provisions of the Ministerial Determination on the minimum wage payable to the category of a worker employed on his farms. At the material time, he was paying the workers on his wine estates, 'largely in kind'. To us black South Africans, that it is a euphemism for 'jeroboams of wine' of left-over food. What saved his skin could be that he is 'noticeably light'; and that he had, in the meantime, undergone a road-to-Damascus kind of conversion. In a sense, he realised that 'people come before profits'. He completely rejected the notion that "whites should get the first and best of everything, while the rest of the populace scramble for what is last, and least". And, when the time came for him to apply for financial assistance, on behalf of his workers, in terms of the Temporary Employee/Employer Relief Scheme (Ters), he was not even afraid to disclose all the information required by the Commissioner of the Unemployment Insurance Fund: (1) the list of his registered employees; the different salary scales of the employees on his farms; proof of registration of all his business concerns (and employees) with the Unemployment Insurance Fund and the South African Revenue Services. It is also important to mention that when Santa first made an appearance in Limpopo (to inspect his tea estate), he was nearly killed by the members of the community of Makhado. They were livid; some of them suggesting that he be burnt at the stake. Others were talking 'firing squad'. They were accusing him of always carrying the 'thick black book' which, they feared, he would use to make them completely pliant and rob them of their livestock and fowl-runs. This is what some people who look like him did to their forebears, they muttered under their breath. He even referred to himself as a 'child of God', much to their annoyance. This was, in their view, a perfidious or treasonable act. "Does he mean that we are children of a lesser god?", they bellowed rhetorically. For them, God has always been at the centre of their personhood and nationhood. He is, in fact, *their* real ruler. Everything they do is per, and in supplication to, *uMvelinqangi*. An insult to him is an insult to the nation. However, some bright spark among them came up with yet another plan: that they "bring some pressure to bear on" a local magistrate, to issue a warrant authorising Santa's indefinite arrest

and detention at Makhado Police Station. In his usual nonchalant demeanour, Santa simply laughed off their threats, as a waste of time. He told them, wryly, that South Africa was a constitutional democracy; and that the charge lacked the essential elements in that (a) he does not owe any "allegiance to South Africa as a state"; and (b) he has never displayed any "hostile intent" towards the State, as an international-law entity. Nor have his intentions ever been seditious. His impudence enraged the crowd beyond measure. A day or so thereafter, there was a knock on his door; the police had come to arrest him. He was bundled onto a police truck and taken to Kgosi Mampuru Prison in Pretoria. Some of his workers advised him to employ the services of an advocate, and approach the High Court in Pretoria, on an urgent basis. In his application - made 'virtually' of course - counsel relied on the common law remedy of *habeas corpus*, and of course, the provisions of the Constitution (on the right to freedom of movement, access to the courts and a fair trial). After easily disposing of the urgency leg of the application, counsel proceeded to argue that his client's arrest and detention were unlawful, particularly because he was not even detained at Makhado Police Station but at Kgosi Mampuru. First prize for counsel was to challenge the flagrant manner in which his client was deprived of his liberty. On the strength of his papers (and contention), he emphasised that, at a bare minimum, the arrest and detention of any suspect should be faithful to the language used in the original warrant (ill-gotten though this one might have been). Needless to say, Santa was released. He is now in the process of instituting civil proceedings against the ministers of justice and police services.

It is important to mention that a sage in the community of Makhado had already warned, in his pithy, *kort-en-bondig* style: "*Muyisa loyi ananandzu, kambe angananandzu*" (this man is guilty, but is also not guilty). In a way, the old hat was demonstrating to them that the law can condemn or exculpate anyone, depending on whose instrument it is at a particular time. The imperfection or pliability of language also exacerbates matters and can conduce to the perversion of legal or ethical values. To paraphrase Shakespeare, "what is foul becomes fair;

and what is fair, foul". And, the law ends up being used by the wealthy and powerful, to suppress the voices of the weak and powerless (Macbeth: Act 1, Scene 1 and 3). The sage even reminded them how Santa had given legal advice to some of them, who are members of the South African Defence Force. They are currently on suspension. He specifically spoke to one Muthupei Ravele, a commander of one of the platoons, that soldiers are not supposed to act alone, but in concert with the members of South African Police Service and the Makhado Metro Police, when carrying out their duties under Alert Level 5 of the 'State of Disaster' - in terms of the Disaster Management Act 57 of 2002 and the Regulations thereunder. As matters stand, Ravele and his team have been indicted for murder. It is alleged that they entered the homestead of Nditsheni Makwerele, a resident, walloping his wives and children with batons, as they rushed to the main house. It is not clear, yet, what these 'men of the law' did to Makwerele. What is clear, though, is that he is dead. And, if the Military Ombudsperson's Report – and the preceding investigation – is anything to go by, then Ravele's actions – and those of his men – were excessive, unlawful and/or irrational. It is also important to note that it is people like the old sage who saved Saint Nicholas from the dreaded 1980s 'necklace' method, for suggesting that they wear replicas of his 'ugly' heavy, woollen, red-and-white suit – and the matching hat – in that scorching December Tropic-of-Capricorn sun.

It seems Santa understands this 'principle': there is a lot that remains unsaid whenever human beings open their mouths to say something. We have to listen closely to what our fellow men often leave unsaid. For that reason, the law itself, as a discipline, is not about what it says. It is about what it does not say. Non-lawyers can read for themselves and have a general sense of what the law is about. So, when people decide to 'lawyer up' (as the Americans are wont to say) do not do it merely to have Acts of Parliament, and principles, regurgitated back to them. After all, they may already be *au faire* with the history, matrix and the *travaux préparatoires* on which the particular piece of legislation is founded. However, lawyers are trained to understand that language is very pliable; and, that no one can claim to have a

monopoly on its interpretation, meaning and nuances. The 'Law School' does 'let lawyers in on' the secret of language, through the rules of interpretation and legal science. And 'logic' – which is an integral part of legal science – also plays an important role in this process. It helps fledgeling legal eagles to understand the significance of deduction, induction and syllogism which are as much a part of general research methodology as they are juridical interpretative tools in the forensic arsenal. These 'aids' help to reduce the possibility of drawing conclusions that are *non sequitur*; or outright 'leaps of logic' (false syllogisms). An example of a false syllogism could be as follows: Santa Claus is part of the white race (major premise); Jesus Christ was white (minor premise), and therefore, only white people can claim Jesus Christ as their Saviour (conclusion). That this guy was born somewhere in the Middle East (through non-penetrative sex to boot), does not seem to bother them!

#### 4. *The Bible, the reversal of values and the existential paradox*

Finding loopholes in the law (written or unwritten) is not a novel invention. It is an age-old trick of the trade. For instance, in the Bible, there is the story of Nicodemus who, in the dead of night, sneaks into Jesus Christ's abode. Nicodemus was one of the intelligentsia (a judge, and jurist) of the time – Pharisees. This was an exclusive coterie of men who were bent on disparaging Christ's teachings. I would even venture to say that these are the people who are responsible for sowing the seed of "intellectual incest", and nurturing it. Everyone who was brought up under its influence, or who imbibed it at the feet of its adherents or practitioners, labours under the illusion that they have the keys to King Solomon's wise mind and his heavenly library. It is as if the knowledge they possess was revealed to them, exclusively, by God. It cannot be questioned, because it comes with an incorrigible, ecclesiastical template. However, like its eugenics cousin, this kind of 'intellectualism' seeks to breed a particular kind of 'thinker'. An oxymoron, if you asked me.

It was partly for this reason that Nicodemus decided to confer with Jesus under the pall and shroud of darkness. Like the other pretentious egg-heads of his time, Nicodemus did not want to be seen in the Holy Man's company. Hence the colloquial adverb, 'nicodemously'. However, no amount of darkness can conceal anything from God's glare. However, despite the Almighty's omnipresence, this kind of behaviour continues unabated – in South Africa and the world over. Our colleagues who often sit and drink coffee with us or chat with us on the phone or social media, pretend to despise us in public – in the malls and pavements of our towns and cities. It is as if they would not even touch us with a barge pole. Ironically, this is the same crowd that resorts to the subterfuge and anonymity of the internet, ostensibly looking for 'dirt'. When one reciprocates - *a la* Newton's Third Law of Motion – by reacting to their actions - one is ostracised as being "unpredictable, and difficult to work with". These labels seem to be a convenient placeholder, just like variables in a mathematical polynomial.

During the furtive meeting with Jesus, Nicodemus wants to know what it is that he needs to do to see the Kingdom of Heaven. Jesus tells him that he needs to be 'born again'. Nicodemus retorts, sarcastically, "How can someone be born again when they are (already) old?". In Nicodemus' earthly view, that was supposed to be the end of the conversation; that there was no 'coming back' for Jesus (pardon the pun). Jesus retorted, saying that Nicodemus needed to be "(re)born from water and spirit" (John 3:1-21). Jesus was, in a way, intimating that "one does not have to be a lawyer to know the law!" As we know, Jesus continued 'to flip the script' – demonstrating that all of (wo)man-made law is full of *lacunae* (*cassus omissus*). In a way, he was helping make sense of the nonsense that the rulers' ill-penned statutes and decrees were. According to the Pharisees, no one, including Jesus Christ, was supposed to heal the sick or preach the Gospel of repentance and humaneness on the Sabbath. In his riposte, Jesus 'called them out' for the real hypocrites that they were, who honoured those laws more in breach than in observance. This, he demonstrated by asking a question that he already knew the answer to: whether they would not make an



effort to save any of their animals if it fell into a ditch. Not only was the Son of Man teaching them about the concept of 'necessity', but he was also laying down legal principles for posterity: that the laws of any country should be used only for the purpose for which they were intended; that they should be fair, just, equitable - and rational too. In a way, he was initiating (Wo)Man into the purposive approach to law. For that, he was crucified. The other charge was that he kept touting himself as the Son of God.

William Shakespeare – a wordsmith *par excellence* – also demonstrated, through his plays, that language is flexible and pliable: one can do with it what one will. If you are for justice, you will find mounds of exculpatory facts and factors – *pro reo*. Conversely, injustice blinds people to the truth; they will find every reason to convict – even an innocent person. The world, particularly the United States, is replete with such cases. In one of his classical plays, the *Merchant of Venice*, Shakespeare teaches the reading community (civilized world?) about the limits of language, the purpose of punishment, mercy, proportionality and justice. In it, Shylock, who is the creditor in the play, has lent money to Antonio, with Bassanio, a wealthy ship-owner, standing surety to Antonio. When payment becomes due and payable, Bassanio demands to be paid at all cost – whatever the circumstances. The problem, however, is that Bassanio's ships are stranded on the high seas; and can, therefore, not pay the debt on time. When the matter is brought before the court, Shylock, like a bloodhound already smelling the maroon liquid, is waiting to get his 'pound of flesh'. According to the contract, the pound was to be cut from a part closest to Bassanio's heart. However, Portia, Antonio's fiancée – who had disguised as a judge in the interim – had other ideas. She told Shylock that he could go ahead and cut his pound of flesh. However, as is the case with these matters, there was a catch. There was to be 'no jot of blood' spilt in the process of cutting. Also, the weight of the flesh cut was not to be "light or heavy in the substance"; nor was the scale to "turn in the estimation of a hair". Needless to say, Shylock did not get his kind of 'justice' from the 'judge' (Act IV, Scene I). And, it is interesting to note that one of our Mesdames Justice, Her Ladyship

Nkabinde J, a former justice (and Acting Chief Justice) of South Africa's Constitutional Court, helped to plant and nurture, the 'proportionality principle' into the then rocky surface that is the country's Law of Contract (*Rich v Botha* 2014). In reality, it had become customary for one person to exploit the lack of education and sophistication of others, for his or her financial gain. *The mantra*, for those involved in this area of the law, was, "Hey bru. People are allowed to make fools of themselves." And, for the more cunning ones, the refrain was (and still is) "to push a hard bargain at whatever cost". Thankfully, the judges have now ruled that the consequences of a breach of a contract should not, in any way, be disproportionate to the breach itself.

Even though most of Santa's workers live in hovels that pass for houses, on an illegally occupied piece of land, he has atoned and is still atoning for his wrongs. Remember his approach to the 'in-kind rule' mentioned above? He also needs some catharsis for allowing many of the injustices to persist for longer than they have, in his presence. He has conceded that he could (and should) have done much more, to dissuade his workers from wrongly using the slogan 'The Land is Ours', and distorting the clear words and message contained in the excellent compendium of the same name, to occupy another person's land illegally. He is now the one who is reminding us that, in South Africa, "everyone has a right to adequate accommodation"; and that that right includes the right to a concomitant supply of electricity. Also, he tells them that no one should be evicted from any piece of land - or any structure built thereon demolished - in the absence of a court order. Evictions, in South Africa, can only take place when there has been an application to the court, which is followed by judicial intervention and supervision. The process is intended to ensure that all the factors and circumstances at play are taken into account. It is also important to note that "judicial intervention" is a prerequisite to any property being declared attachable for purposes of a "sale in execution of a judgment". Courts take a very dim view of any application that is intended to have families evicted from a place they have become accustomed to calling 'home', particularly during the current 'State of Disaster'. Yes, the *raison d'être* for the 'lockdown' Regulations is to

prevent and contain the spread of the Covid-19 (Corona) virus. However, Santa continues to emphasise the point that the Regulations should not be viewed as a kind of licence to trample on the of the fundamental rights of the country's denizens. He is constantly talking about the *dictum* in *Kruse v Johnson* (1998) – a *locus classicus*, albeit British, on how subordinate legislation should be dealt with. The rules enunciated in that case have found their way into our human rights jurisprudence. Santa says that any set of regulations, such as those published in Government Notice 43258 (2020), must be reasonable, rational, and not discriminatory - in their general objective and operation; nor should they be motivated by bad faith. The values enshrined in the Constitution should suffuse the country's entire politico-legal edifice. Government functionaries must always be held accountable for their unlawful actions - which are by definition reviewable – to ensure fairness, equity and justice. Santa calls this phenomenon 'transformative adjudication'. He cannot even spell 'progressive'. This is a term that is used by some among us who think that they are the "transcendent lights in the largely oppressive gloom that stalked the halls of academy like a dark spirit ('Sting' *Broken Music* (2003)). Or that they are more politically and socially conscious – or possess a greater sense of probity than the rest us, as a form of thought control. *Andizi!!*

It is also clear that this make-believe saint has been poring over the judgment of Victor AJ in *Beadica v Omega Trustees* (2020) CC, and many other similar ones from the various courts of the country. This kind of adjudication, he stresses, behoves all concerned, not only to place a premium and primacy on the law, rule or regulation that is under construction but to also ensure social justice in every given situation. The law should also serve the needs of the 'weakest and the worst' in our society, not just those of the wealthy and the well-heeled (*S v Makwanyane* (1995) para 48-90). He even appears to have been influenced by the writings and speeches of Martin Luther King Jr (including the classic, 'I Have A Dream'). He always tells whoever cares to listen that "the moral arc of the universe is long, but that it always bends towards justice". He even uses the East African tradition of

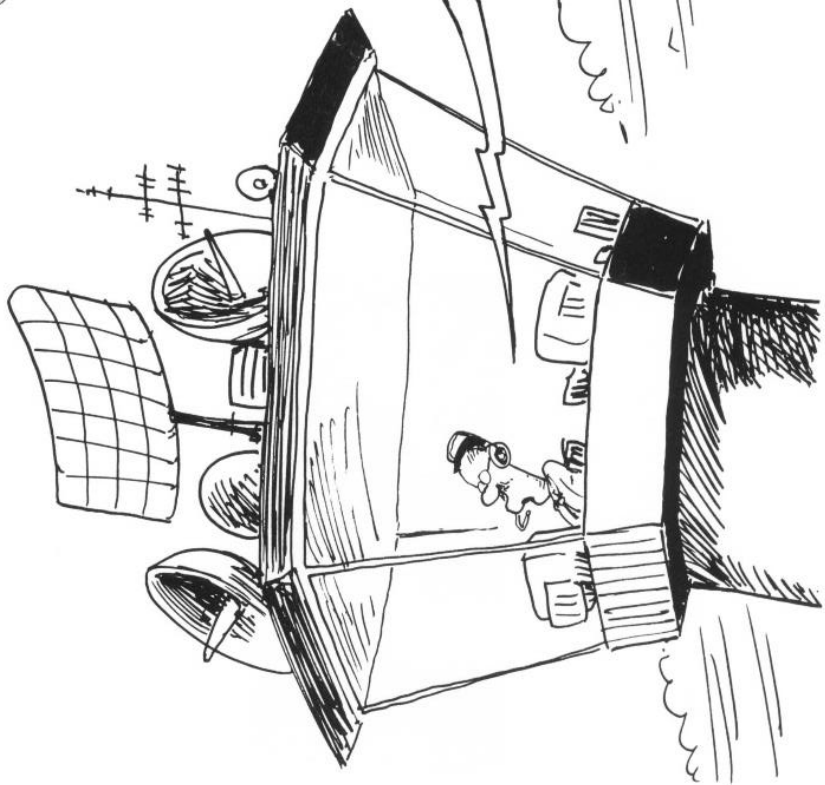
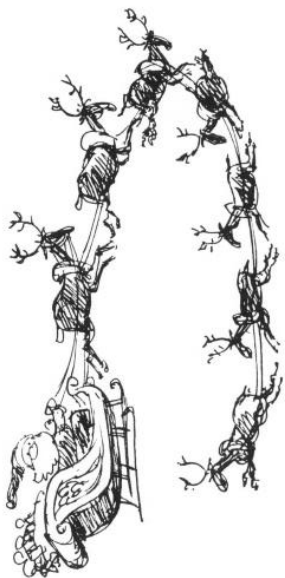
*gursha/gorsha*: to emphasise his point: that we should not feed one another from the poisoned plate of prejudice and hatred, but nourish each other from the pot of equity, fairness and justice. In sum, Santa is saying that, if transparency, openness, consistency and fairness are front and centre of any leader's mind, nothing can ever go wrong.

Santa Claus' outlook on life seems to have been influenced by three theories. The first one is Gulliverian theory. And, as someone who is used to living with, and among, elves, he knows a lot about the story of Gulliver, the giant - and the dwarfs. The dwarfs, that he used to despise and look down upon, used kilometres of the spider-web threads, to tie him up, securely, whilst he was in a drunken stupor. This has helped to teach Santa, against his better judgment, not to ignore the voices of the *hoi polloi*, the social underclass. It could be dangerous. Second, is the Scythian theory. It was propounded by the sixth-century, Greek philosopher, Anacharsis. Again, it teaches that the law is like a spider web; it only catches small insects, like mosquitoes. The bigger ones just fly through it, gleefully. In the Orwellian sense, they are "more equal than others". That should not be the case; lest we plunge humanity into the abyss. Third, is the Brattonian theory. It is sometimes referred to as the "zero-tolerance" approach to crime. It was made famous by William Bratton, the former Police Commissioner for the City of New York. According to Bratton, the work of the police was to be founded on (1) providing proper and effective training for the police, thereby ensuring their physical and psychological well-being; (2) fostering good relations between the police and members of the community, (3), and providing these men and women with adequate remuneration with all the concomitant perks and benefits.

The lesson to be learnt from these theories is that man-made laws (and principles) are not impregnable; and sadly, can be perverted, by zealots, to achieve what they were never, ever, intended for. It is for that reason that in Bratton's backyard, 'suspects' are often killed - merely for asserting their constitutional rights - which is often characterised as being 'cheeky'.

## *5. Conclusion*

Needless to say, Saint Nicholas would have had a very difficult choice - a Hobson's choice to be exact - if he had landed in a country other than South Africa. An example of such a country would be one that is lorded over by a tyrannical figure who knows nothing about human rights, much less about the immutable value of human life.



# Part 3

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*Elves of the World, Unite!*





## 8

# *Four Reasons why Santa is not Employer of the Year*

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*Elmarie Fourie*

He's making a list and checking it twice, gonna find out if you are naughty or nice...but have you ever considered that Santa might be the naughty one? Behind the cheery smile and bright red suit, is perhaps an employer who does not value his workers or the rule of law. If you have any set notions about Santa, don't read any further, we may dash some childhood dreams and fantasies. Here are just a few examples of how Santa has contravened every labour regulation in the book.

### *1. The 12 days of Christmas...more like 365 days*

If you thought that, the rocking horses and dollhouses under the tree made themselves – you're wrong. Elves are required to work 18 hours, seven days a week with no lunch break and no overtime – turning a festive workshop into a sweatshop. In fact, most elves (except for the male elves who received better contracts, coz reasons) work for free. This is a direct contravention of one of the eight core conventions of the International Labour Organization of which the North Pole is a member state. Benefits, *pffff* let's not even go there. You'd expect medical aid, workman's compensation (for occupational injuries in the workplace), a travel allowance and maybe a nice performance bonus. The only free thing? Candy canes, so dental coverage should be a priority. Unfortunately, Santa and his wife (a non-executive director)

earn an astronomical salary since Santa Co listed on the North Pole Stock Exchange (NPSE) in 2017.

## *2. Tis the season to be jolly... or not*

Rumours have circulated that reindeer are also overworked, receiving nothing but carrots for compensation. Apparently, HR ignored Rudolph the Red Nose Reindeer's bullying grievances. He has cited emotional trauma and harassment as a result of name-calling and purposeful exclusion from team building activities. Santa has also been overusing his red nose for activities that fall outside of day-to-day work tasks. Elves are also required to tend to the reindeer without protective gear or suitable training. Instead of investors opting to purchase additional transport equipment, Santa has chosen to reallocate funds elsewhere...

## *3. Speciesism and sexism*

Keen to start a cosy elf family with a nice polar bear in the front garden and a white picket fence? Forget it. Not only are female elves discouraged from falling pregnant, but those who do (particularly out of wedlock) are also banned from entering the factory (as you may have gathered maternity policies and benefits are non-existent). One anonymous elf told of being called into Santa's office and being asked if she would "like a lover for the night." She politely declined, however, her friend, "Merry Eggnog" accepted the proposition and was soon promoted to head of the Train Track division. What's more, mistletoe is placed EVERYWHERE with employees pressured to follow through on tradition. Have you seen mommy kissing Santa Claus? Well, that happens too but that's another story...

## *4. You're fired...*

No this is not another episode of elf apprentice. The possibility of dismissal and the resulting loss of livelihood looms over workers day in and day out. Say something negative about Santa's wife's beard – pack your bells and whistles immediately (the hat is actually Santa Co

property so you can't even take that as a keepsake). There is also talk of outsourcing and downsizing, despite large profits being reported. Employees surely have the right to sufficient job security, fair labour and retrenchment practices and the right to a voice and representation.

## **#NEWSFLASH**

This just in, it's all over elf Twitter. Elves are joining in solidarity and unionising with a proposed strike on the horizon! Christmas could be ruined.

Comments from workers in the toy factory: Sugarplum Mary: "My mother (Figgy Pudding) was a toymaker elf and my father (One Horse Open Sleigh) was in logistics and distribution - that's why I'm a unionist. The organisation, now known as The National Union of Elf Workers (NUEW) have put forward several demands – more than cookies for pay, no unfair discrimination and fair and safe working conditions. Santa has certainly found himself embroiled in some not so Christmassy cheer.

Elves picketing outside the toy factory, were dancing and singing as they made their voice heard:

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*We don't want a lot for Christmas  
There is just one thing we need  
We don't care about the presents  
Underneath the Christmas tree  
We just want fair labour practices in the toy factory!*

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## *Why Santa, Why?*

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*Tertia Jacobs*

### *1. Introduction*

Oh, Santa! You have been a very naughty boy this year!

Santa Claus is said to live at the North Pole with his wife where he spends the year making toys with the help of his elves. This is where he receives his letters from children asking for Christmas gifts. On Christmas Eve he loads his sleigh with toys and flies around the world, drawn by eight reindeer. He stops at each child's house, slides down the chimney and leaves gifts for the children, refreshing himself with the milk and cookies left for him by the household's children.

Nevertheless, has the idea of the jolly old fat man that we all grew up with and loved changed?

### *2. Leading Santa into the 21<sup>st</sup> Century*

When we think of Santa, we often think of the glamorous side of his job, but running the North Pole is hard work! With thousands of elves and another dozen reindeer, Santa has his hands full. With the ever-evolving and changing world, it seems that Santa has become a bit greedy and, dare I say, negligent, in keeping up with the ever-evolving trends.

Take the Fourth Industrial Revolution (4IR) as an example. It is described as an incoming and sweeping pattern of change visible in the distance. It arrives at a pace that affords little time to prepare. While some people are ready to face the challenges and are equipped with the tools to brave the change and take advantage of the opportunities

it presents, it will likely have far-reaching implications and transform where and how work is done. Yet, this exponential progress is only visible to and accessed by some. Its effects vary by country and culture, necessitating different approaches to address issues of automation and digitalization. This unevenness leads to important questions for all areas of our community and, yes, even elves. A sector that is preparing for the future of work while simultaneously acknowledging that its future workforce may not be prepared for 4IR or even know that the revolution is upon us. The elves and the reindeer have no idea that a storm is brewing. Santa Claus decided that this is the year to embrace technology.

### *3. Drone technology*

Imagine the immense task of delivering millions of packages to children located all over the world in one night. The time zones and jet winds can help but Santa has no room for error. He has always run a one-sleigh operation, but innovation could help him accelerate deliveries and save energy by adding a drone to his route. Santa decided to approach the best drone racing company to help him with this business. Using a drone would most definitely take the pressure off Rudolph and the other reindeer, as they would no longer have to load the sleigh with toys and fly around the world in one night to deliver all the toys. Santa did not take this decision lightly as there would be some serious consequences in changing the delivery method. Maybe the most important one of all would be the fact that Santa would miss all the milk and cookies left by the thousands of children if he did not personally come down the chimneys and place the gifts under the trees.

### *4. Toy manufacturing*

Santa's toy factory in the North Pole might be one of the world's oldest and largest factories. The seamless operation of the factory is key for its ultimate goal, which enables Santa to deliver gifts under the tree. The factory has had its problems with an outdated working

environment, production, and processes for years. The rise of new technologies has provided Santa with the means to fix these issues.

This year's toy manufacturing is on track to become the smoothest operation to date. This is thanks to Santa's new state-of-the-art toy-making centre, which is fully equipped with cutting-edge display processing and control management technologies. Santa is thrilled with his new system. The system is sophisticated enough to handle the multiple competing demands of this large-scale enterprise but is intuitive enough that, in a pinch, even a reindeer could operate it.

Previously, the only way that Santa could oversee the manufacturing was to send one of his designated head elves to visit each facility in person. A lack of enough elf-power, quality control was a hit or miss affair because Santa could not monitor the entire system as required. When there was a problem at the factory, all toy production would cease until the appropriate elves could travel to the site, diagnose, resolve the issue, and give the authorization to resume operations. This would typically lead to serious delays and backlogs, further compounding the logistical nightmare of the Christmas enterprise.

Santa has been on a mission to make his factory smarter and to improve the working conditions for the elves. Using a revolutionary up-to-date system would provide Santa with all the support he needs. No doubt, his toy-making enterprise would thrive for many years to come.

## *5. Revolutionize the naughty and nice list*

Over the past few years, Santa has been looking for ways to provide the same great service to his 525 million customers. After detailed research, Mrs Claus (the astute wife of Santa Claus) chose to collaborate with Great Expectations in assisting with tracking the naughty and nice list.

The days of managing stacks of letters thousands of centimetres deep, are slowly but surely disappearing. The elves are not able to electronically capture the letters as they come in. Each year, more and more of the letters are received electronically and, in years past the

printers in the North Pole had to work overtime to keep up. Now, with updated processes and the right technology, Santa has access to each letter to him within a few hours of its arrival.

Once letters have been ingested into the system, the elves in the mailroom index the letters with information which links the letter to a specific child's case. Each case is made up of a collection of data that has been collected throughout the year by the team of field elves. Living on shelves, they spend their time collecting pictures, notes from school, reports from babysitters and any other information that may help Santa make his ultimate 'naughty or nice' determination.

Santa can get out his tablet and pull up a specific child's case, at any given time. All the information he needs to make an informed decision about their behaviour is gathered in one place. Once he has made his decision, he is prompted with an e-form that allows him to dictate what presents the elves should, or should not, be made for a child.

Santa also researched a fingerprinting system. An application would be downloaded to the parent's phone. With the simple scanning of a finger, the application would connect to the North Pole, access Santa's database and scan to his list. This would lead to either a celebration with cheers or to the whirring sounds of sirens!

The different types of electronic systems available could be very helpful to Santa, but he must make sure that he places someone in charge of the systems whom he completely trusts, perhaps Mrs Claus. The repercussions of an elf accidentally or maliciously deleting or broadcasting the 'naughty or nice list' would be devastating.

This new revolutionized method of working would eliminate the risk of letters falling through the cracks. Recording would be done in record time and allow more important things to take priority. The increase in the world's population and the ever-growing complexity of toys would allow the elves in the workshop to focus on making toys for every child on the 'nice list'.

## *6. Dismay at the North Pole*

The elves, in general, were not happy at all. Not only did Santa not discuss any of the above-mentioned changes with them but, they realized that they were being phased out by machines. The elves argued that they are powerful, energy-packed beings with amazing spatial reasoning ability, giving them an instant understanding of Lego and dollhouse structures, which greatly increased productivity. Another argument was that there is nothing inherent in so-called 4IR technologies that will necessarily result in growth, job creation or empowerment of the marginalised. They also argued that it is not that advanced technologies cannot be mobilised for development purposes but that technology, in itself, cannot change or disrupt existing modes of production. It also cannot determine positive or negative outcomes.

They immediately decided to join a union because this was completely unacceptable. Santa is not above the law so why should he be treated any different from any other employer?

## *7. Trade Unions*

Trade unions are independent organisations that represent workers to their employers. If you join a trade union, you are joining a group that will negotiate workplace issues, such as salary, hours of work, and other conditions on your behalf and this is exactly what the elves did. They joined a trade union!

The elves were in complete shock after their initial consultation with the union they joined. Elves do matter! It seemed that not only was it unacceptable for Santa to make these decisions without their input, but Santa had also deprived the elves and reindeer of basic employment conditions, personal protective equipment and basic needs to name but a few.



The Basic Conditions of Employment Act 75 of 1997 clearly states the following:

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Purpose of this Act

2. The purpose of this Act is to advance economic development and social justice by fulfilling the primary objects of this Act which are—
  - (a) to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution—
    - (i) by establishing and enforcing basic conditions of employment; and
    - (ii) by regulating the variation of basic conditions of employment;
  - (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation.

Ordinary hours of work

9. (1) Subject to this Chapter an employer may not require or permit an employee to work more than:
    - (a) 45 hours in any week; and
    - (b) nine hours in any day if the employee works for five days or fewer in a week;
    - (c) eight hours in any day if the employee works on more than five days in a week.
- 

Not only do the elves work more than the above mentioned hours of work, but they also do not receive any leave days, adequate daily and weekly rest periods, sick leave, maternity leave, and many other basic conditions that are clearly outlined in the Basic Conditions of Employment Act.

One elf, in particular, Sugar Plum, felt that Santa had treated her unfairly and unkindly. She had recently given birth to a beautiful little elf named Esmerelda. Instead of taking time off to spend with her new baby, she immediately had to go back to being Santa's secretary, because Santa claims that she makes the best hot chocolate with the perfect balance of marshmallows.

Section 25 of the Basic Conditions of Employment Act states the following regarding maternity leave:

- 
- (1) An employee is entitled to at least four consecutive months' maternity leave.
  - (2) An employee may commence maternity leave—
    - (a) at any time from four weeks before the expected date of birth, unless otherwise agreed; or
    - (b) on a date from which a medical practitioner or a midwife certifies that it is necessary for the employee's health or that of her unborn child.
  - (3) No employee may work for six weeks after the birth of her child, unless a medical practitioner or midwife certifies that she is fit to do so.
  - (4) An employee who has a miscarriage during the third trimester of pregnancy or bears a stillborn child is entitled to maternity leave for six weeks after the miscarriage or stillbirth whether or not the employee had commenced maternity leave at the time of the miscarriage or stillbirth.
  - (5) An employee must notify an employer in writing unless the employee is unable to do so of the date on which the employee intends to -
    - (a) commence maternity leave; and
    - (b) return to work after maternity leave.
  - (6) Notification in terms of subsection (5) must be given—
    - (a) at least four weeks before the employee intends to commence maternity leave: or
    - (b) if it is not reasonably practicable to do so as soon as is reasonably practicable.
  - (7) The payment of maternity benefits will be determined by the Minister subject to the provisions of the Unemployment Insurance Act.
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If only Sugar Plum had known her basic rights about maternity leave, she could have spent more time with her baby and would not have gone back to work for Santa immediately.

Another great concern for the elves was that Santa did not adhere to the Occupational Health and Safety Act 85 of 1993 (OHS). The OHS Act

aims to provide for the safety and health of persons at work and in connection with the use of plant and machinery. It further provides for the protection of people from hazards arising out of or in connection with the activities from other people at work.

The main objective of the Act could be described as a pro-active attempt by the government to prevent and avoid work-related injuries and illness. The Act governs the health and safety of the diverse industry of South Africa. It regulates and controls health and safety in all organizations, from a normal office environment to more hazardous environments like industrial plants and construction sites.

Legislation requires Santa to do everything 'reasonably practicable' to protect the elves from harm.

Santa needs to look at his work environment, and ask questions, such as:

- Have I identified hazards?
- What could go wrong?
- Have I identified who might be harmed?
- How are the elves affected?
- What could be done about it?

After evaluating these work-related hazards, risks and dangers, Santa should determine the severity of the hazards or risks concerned. This mainly refers to 'seriousness of these hazards' as previously mentioned. During the risk assessment process, the risk will be given a "risk value" to determine the severity of the risk involved, for example, high-, medium- or low-risk level.

The main objective should be to 'remove or mitigate that hazard or risk'. If the hazard or risk cannot be removed, the next option would be to apply appropriate steps or measures to mitigate it. The Merriam-Webster dictionary defines mitigate as "to cause to become less harsh or hostile". Where Santa cannot remove or eliminate a hazard or risk, steps should be taken to lessen it.

Risk cannot just be disregarded; Santa still needs to take reasonable steps to ensure that the workplace is safe and without risk to the health

and safety of the elves. Reasonable steps exercised by Santa could, for example, include the following:

- inform the elves of the decision and measures taken to protect them;
- what type of instruction, training, supervision, personal protective equipment etc. are needed to protect them?
- assess if the reasonable steps are effective to provide a safe and healthy workplace;
- having their workspace, due to their age and strengths;
- personal lighting control must be installed to allow for adjustment at every workspace according to every elf's preference.

Santa has not taken any of these steps!

### **8. *The Elves are on strike!***

After careful consideration and discussions with their union representative, the elves decided that it was time to have a strike in the toy factory. No longer were they going to be the victims of someone that does not obey the laws of South Africa. He does not regard it important enough to even discuss the contemplated technological changes with them. Not only did they demand to be made part of the decision-making process, but they also demanded more cocoa breaks, leave time, more time to sleep, and some sort of safety plan in case an accident or emergency should arise. They felt that Santa was overworking them and refused to accept his authority as a result of this. They also felt that keeping tabs on their productivity is unfair and unprofessional since he does not contribute to the making of toys at all. The elves also decided that they need medical aid as they work with machinery, that Santa now insists on changing, and even upgrading.

### **9. *Negotiations on the horizon***

Serious negotiations started between the elves and Santa. Santa explained that technology is always changing and that they all need to

stay informed of the latest changes, including himself. They did not have to settle for the technologies and working conditions of the last century. He also reminded the elves that the years when there was a demand for 2 million wooden train set (where at least 4 elves had died from splinter-related complications) were gone. They needed to stay informed, from traditional toy-making to the most current and up-to-date computer games. Due to modifications and updates of computer games, the elves would need to continue classes to improve their skills.

### *10. A raging riot*

While Santa was in negotiations with the elves, one of his most loyal elves came to tell him that Rudolph the reindeer had started a riot in the stable. He complained that the elves did not take good care of them. They were not trained well, and the feeds were not what they used to be. They also felt that the stable was not clean enough and they were not given water twice a day. Rudolph took charge of the riot and made sure that havoc was all over the stable. Food was thrown all over and the blankets were torn into pieces. Even the food bowls were broken. He made sure that even the youngest reindeer became part of this riot, to understand what they were fighting for. Rudolph explained to Santa that he and his team of reindeer needed to be in top form for the annual flight. He requested an explanation from Santa about the rumours going around that he wanted to replace them with drones. Santa had some explaining to do. Rudolph wanted the negotiations to include that he wanted a rider to ensure that his nose was polished daily, and that red and green Smarties® were made widely available throughout the reindeer compound.

All havoc broke loose between the elves and the reindeer. Santa realized that this would, of course, lead to a major rivalry between the two parties as both felt superior to the other. Since elves are small, they seemed to be jealous of the reindeer that got to see things from an elevated point of view. The North Pole is surrounded by arctic terrain and fairly level. The reindeer, on the other hand, felt important because they deliver the gifts and, without the delivery of gifts, there would be no Christmas.

## *11. Decisions, decisions, decisions*

With all the hustle and bustle leading up to Christmas, Santa will need to make fast and furious decisions. There are still a few days of work ahead. He knows that he cannot do this by himself and must find a solution quickly.

He would resolve the issue surrounding annual leave by sending them to an ideal destination for a few days' rest, perhaps Scandinavia after New Year's Day. Although it is very cold, there the elves might like it because of its many eco-lodges. Taking a dip in the geothermal hot springs might just be the relaxing atmosphere they deserve. Threatened with the possibility of industrial action, Santa considered it a price worth paying to ensure no disruption to Christmas.

Santa also believes that the extra time off will be beneficial to the elves' mental health. He has been increasingly concerned about how fatigued his elves became after the Christmas rush was over. Santa also realized that he needs to consider medical aid, as expending a lot of energy might lead to some clumsy scrapes and scratches. He knows that medical aid is very expensive and was wondering if a visit to a medical aid broker would be advisable.

Finally, after what felt like hours upon hours, Santa, the elves, and the reindeer came to a satisfactory conclusion, for now. They settled on all the major elements of their concerns and demands. Santa knows that the matter of the elves and reindeer is certainly not over. There are still many issues that need to be discussed. At least for now, Christmas will continue this year and all the children on Santa's digital list (Yes! Santa slipped through this one!) will receive their gifts. Drone delivery of packages is a fight for another day. For now, Santa is pleased to be putting this year behind him and looking forward to a well-earned rest after Christmas.

This question begs an answer though; is Santa really bound by South African law or does he play by a completely different set of rules?

## 12. List of references

Basic Conditions of Employment Act 75 of 1997.

Butler-Ada J "The Fourth Industrial Revolution and education" (2018) 114  
*South African Journal of Science* 1.

Gilward A "South Africa is caught in the global hype of the fourth industrial revolution". Available at: <https://theconversation.com/south-africa-is-caught-in-the-global-hype-of-the-fourth-industrial-revolution-121189>. (Accessed: 4 October 2020).

Morris J "Manufacturing and 4IR: Drones". Available at:  
<https://lombard.contentive.co.uk/content/1002a094-d963-97a3-9883-0e012027fe72>. (Accessed: 4 October 2020).

Occupational Health and Safety Act 85 of 1993.

10

*Ho, Ho, Ho, Ho, You're Fired!*  
*Floppy the Elf refers a Dismissal*  
*to the CCMA*

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*Marius van Staden*



<p style="text-align: center;">LRA Form 7.11</p> <p style="text-align: center;">Labour Relations Act, 1995 Sections 9, 16, 21, 22, 24, 26, 45, 61, 63, 64, 72, 74, 86, 89, 94, 134, 191(1), 198 and 198A-C Employment Equity Act, 1998 Section 10 Basic Conditions of Employment Act, 1997 Sections 41, 69(5), 73A, 80, 84 Skills Development Act, 1998 Section 19 National Minimum Wage Act, 2018 Section 4(6)</p>	<div style="text-align: center;"> <h2 style="margin: 0;">REFERRING A DISPUTE TO THE CCMA FOR CONCILIATION (INCLUDING CON-ARB)</h2> </div>
<p style="text-align: center;"><b>READ THIS FIRST</b></p> <div style="text-align: center;"> </div> <p><b>WHAT IS THE PURPOSE OF THIS FORM?</b> This form enables a person or organisation to refer a dispute to the CCMA for conciliation and con-arb.</p> <p><b>WHO FILLS IN THIS FORM?</b> Employer, employee, trade union or employers' organisation.</p> <p><b>OTHER PARTIES</b> If there is more than one employee to the dispute and the referring party is not a trade union, then each employee must supply his/her personal details and signature on a separate page, which must be attached to this form.</p> <p><b>WHERE DOES THIS FORM GO?</b> The Registrar, Regional Office of the CCMA in the region where the dispute arose.</p> <p><b>OTHER INSTITUTIONS</b> Please note that if you are covered by a bargaining council, a statutory council or an accredited agency, you have to refer the dispute to the relevant council or agency.</p> <p>You may also need to deal with the dispute in terms of a private procedure if one applies.</p> <p>If in doubt contact the CCMA for assistance.</p> <p><b>WHAT WILL HAPPEN WHEN THIS FORM IS SUBMITTED?</b> When you refer the dispute to the CCMA, it will appoint a commissioner who must attempt to resolve the dispute within 30 days.</p>	<p><b>1. DETAILS OF PARTY REFERRING DISPUTE</b></p> <div style="display: flex; justify-content: space-between;"> <div> <input checked="" type="checkbox"/> An employee  <input type="checkbox"/> An employer  <input type="checkbox"/> Department of Labour         </div> <div> <input type="checkbox"/> A trade union  <input type="checkbox"/> An employers' organisation         </div> </div> <p><b>(a) Name of the party if the referring party is an employee:</b></p> <p>Name: <u>Floppy</u>  Surname: <u>the Elf</u>  Length of service: <u>1.750 years</u> ID Number: <u>N/A</u>  Salary Gross: <u>None (boarding and candy was provided)</u> Salary Net: <u>N/A</u>  Gender (M/F): <u>Male</u> Age: <u>4/- 2 000</u> Nationality: <u>North Pole</u>  Postal Address: <u>North Pole</u>  Code: <u>1</u>  Tel: ..... Cell: .....  Fax: ..... Email: <u>floppy@christmas.com</u></p> <p>Alternative contact details of the employee (representative / relative or friend)*</p> <p>Name: <u>Lizzie</u>  Surname: <u>the Elf</u>  Postal address: <u>Northpole</u>  Code: <u>1</u>  Tel: ..... Cell: .....  Fax: ..... Email: <u>lizzie@christams.com</u></p>
<p>CCMA Case Number: ..... Please turn over <span style="float: right;">➔</span></p>	

<p><b>FURTHER INSTRUCTIONS</b></p> <p>A copy of this form must be served on the other party.</p> <p>Proof that a copy of this form has been served on the other party must be supplied by attaching any of the following:</p> <ul style="list-style-type: none"> <li>▪ A copy of a registered slip from the Post Office; or</li> <li>▪ A copy of the signed receipt if hand delivered; or</li> <li>▪ A signed statement confirming service by the person delivering the form; or</li> <li>▪ A copy of a fax or email confirmation slip; or</li> <li>▪ Any other satisfactory proof of service.</li> </ul> <p><b>Attach supporting documents.</b></p> <p>The CCMA may be requested to assist with service.</p> <p><b>UNFAIR LABOUR PRACTICE</b></p> <p>If the dispute(s) concerns an unfair labour practice the dispute must be referred (i.e. received by the CCMA) within 90 days of the act or omission which gave rise to the unfair labour practice. If more than 90 days has lapsed you are required to apply for condonation.</p> <p><b>NATIONAL MINIMUM WAGE DISPUTES</b></p> <p>Disputes emanating from the NMWA and referred either in terms of s4(6) of the NMWA or s73A of the BCEA may be referred by any person who works for another and who receives or is entitled to receive any payment for that work.</p> <p><b>MUTUAL INTEREST DISPUTES</b></p> <ul style="list-style-type: none"> <li>▪ Attach the collective agreement on picketing; or</li> <li>▪ If no collective agreement on picketing, complete Annexure A to this form.</li> <li>▪ If referring a request for establishment of picketing rules, complete Annexure A to this form.</li> <li>▪ If referring a dispute relating to breach or interpretation of picketing rules, attach a copy of the picketing rules.</li> </ul> <p><b>DISPUTES RELATING TO COMPLIANCE ORDERS</b></p> <p>If referring a dispute relating to a compliance order, the order must be attached to this form. If the dispute is referred after the date on which compliance was due to you are required to apply for condonation.</p>	<p><b>(b) Name of the referring party if the referring party is an employer, Department of Labour, employer's organisation or trade union, or if the employers' organisation or the trade union is assisting a member to the dispute:</b></p> <p>Name: .....</p> <p>Surname (if applicable): .....</p> <p>Designation: .....</p> <p>Postal address: ..... Code: .....</p> <p>Tel: ..... Cell: .....</p> <p>Fax: ..... Email: .....</p> <p>Contact person: .....</p> <p><b>2. DETAILS OF THE OTHER PARTY (PARTY WITH WHOM YOU ARE IN DISPUTE)</b></p> <p>The other party is:</p> <table style="width: 100%;"> <tr> <td><input type="checkbox"/> An employer</td> <td><input type="checkbox"/> An employers' organisation</td> </tr> <tr> <td><input checked="" type="checkbox"/> An employee</td> <td><input type="checkbox"/> A trade union</td> </tr> <tr> <td><input type="checkbox"/> Department of Labour</td> <td></td> </tr> <tr> <td><input type="checkbox"/> Other (specify): .....</td> <td></td> </tr> </table> <p>(Eg: Temporary Employment Service, owner of the premises or person who controls access to the pre premises where employees work if it is an organisational rights dispute, etc)</p> <p>Full names: <u>Santa Claus</u> .....</p> <p>(If company or close corporation, the name of the company or close corporation)</p> <p>Postal address: <u>North Pole</u> .....</p> <p>..... Code: .....</p> <p>Physical address: <u>North Pole</u> .....</p> <p>..... Code: .....</p> <p>Tel: <u>0800 SANTA</u> ..... Cell: .....</p> <p>Fax: ..... Email: <u>santa@christmas.com</u> .....</p> <p>Company or close corporation registration number: .....</p> <p>Number of employees employed by the employer: <u>110 000</u> .....</p>	<input type="checkbox"/> An employer	<input type="checkbox"/> An employers' organisation	<input checked="" type="checkbox"/> An employee	<input type="checkbox"/> A trade union	<input type="checkbox"/> Department of Labour		<input type="checkbox"/> Other (specify): .....	
<input type="checkbox"/> An employer	<input type="checkbox"/> An employers' organisation								
<input checked="" type="checkbox"/> An employee	<input type="checkbox"/> A trade union								
<input type="checkbox"/> Department of Labour									
<input type="checkbox"/> Other (specify): .....									
<p>CCMA Case Number: ..... Please turn over <span style="float: right;">➔</span></p>									

### 3. NATURE OF THE DISPUTE

What is the dispute about (tick only one box)?

- |                                                                                                                               |                                                      |
|-------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------|
| <input checked="" type="checkbox"/> Dismissal                                                                                 | <input type="checkbox"/> Mutual Interest             |
| <input type="checkbox"/> Severance Pay                                                                                        | <input type="checkbox"/> Organisational Rights       |
| <input type="checkbox"/> Unfair Labour Practice                                                                               | <input type="checkbox"/> Disclosure of Information   |
| <input type="checkbox"/> Freedom of Association                                                                               | <input type="checkbox"/> S180 BCEA                   |
| <input checked="" type="checkbox"/> Unfair Discrimination - S10 EEA                                                           | <input type="checkbox"/> S19 SDA                     |
| <input type="checkbox"/> Interpretation/Application of Collective Agreement                                                   | <input type="checkbox"/> S198 LRA                    |
| <input type="checkbox"/> Disputes relating to breach of collective agreement, picketing agreement or picketing rules (s69(8)) | <input type="checkbox"/> S198B (Fixed Term Contract) |
| <input type="checkbox"/> Unilateral Changes to Terms and Conditions of Employment (s64 LRA)                                   | <input type="checkbox"/> S84 BCEA                    |
| <input type="checkbox"/> Refusal to Bargain                                                                                   | <input type="checkbox"/> Breach of picketing rules   |
| <input type="checkbox"/> S198A LRA (Temporary Employment)                                                                     |                                                      |
| <input type="checkbox"/> S198C LRA (Part-time Employment)                                                                     |                                                      |
| <input type="checkbox"/> Application for Determination of Picketing Rules – s69(6B))                                          |                                                      |
| <input type="checkbox"/> S198A(4) LRA (Dismissal)                                                                             |                                                      |
| <input type="checkbox"/> S198A(5) LRA (Unfavourable treatment)                                                                |                                                      |
| <input type="checkbox"/> Unilateral Changes to Terms and Conditions of Employment - s4(8) NMWA                                |                                                      |
| <input type="checkbox"/> S73A BCEA (Claims for Monies Owed in terms of the NMWA)                                              |                                                      |
| <input type="checkbox"/> S73 BCEA (Other claims for Failure to Pay Amounts Owed)                                              |                                                      |
| <input type="checkbox"/> S69(5) BCEA (Disputes relating to Compliance Orders)                                                 |                                                      |
| <input checked="" type="checkbox"/> Other: Automatically unfair dismissal                                                     |                                                      |

If it is an unfair dismissal dispute, tick the relevant box

- |                                                                                  |                                                         |
|----------------------------------------------------------------------------------|---------------------------------------------------------|
| <input type="checkbox"/> Misconduct                                              | <input checked="" type="checkbox"/> Incapacity          |
| <input type="checkbox"/> Unknown Reasons                                         | <input type="checkbox"/> Constructive Dismissal         |
| <input checked="" type="checkbox"/> Poor work performance                        | <input type="checkbox"/> Dismissal relates to Probation |
| <input type="checkbox"/> Operational Requirements (Retrenchment)                 |                                                         |
| <input type="checkbox"/> Where I was the only employee dismissed                 |                                                         |
| <input type="checkbox"/> Where the employer employs less than ten (10) employees |                                                         |
| <input type="checkbox"/> Other                                                   |                                                         |

### 4. SUMMARISE THE FACTS OF THE DISPUTE (use additional paper if necessary)

I have been working for Santa for many centuries. One day, Santa said that the children of earth do not want the old fashioned toys that I have been making my entire life. Instead of the slinkys, teddy bears and toy soldiers, children now want gender neutral dolls and iPads. I do not know how to make these. Santa told me that it would be better for me to find a new job as he has no use for me. I know that I messed up that one time when one of my toys caused that fire - but I was truly sorry and Santa did manage to settle the case out of court. I do not know what is going to happen me. The North Pole is my home.


CCMA Case Number:..... Please turn over

#### This section must be completed!

If referring a dispute relating to amounts owing in terms of section 73A of the BCEA, please provide details relating thereto.

If necessary, write the details on a separate page and attach to this form.

If it is an unfair labour practice, state whether it relates to probation.

<p>This section must be completed</p> <p>If necessary, write the details on a separate page and attach to this form.</p>	<p><b>5. DATE AND PLACE WHERE DISPUTE AROSE</b></p> <p>The dispute arose on: <u>1 September 2020</u> (give the date, day, month and year)</p> <p>The dispute arose where: <u>North Pole</u> (give the city/town in which the dispute arose)</p>												
	<p><b>6. DATE OF DISMISSAL (if applicable)</b> <u>1 September 2020</u></p>												
	<p><b>7. FAIRNESS/UNFAIRNESS OF DISMISSAL (if applicable)</b></p> <p><b>(a) Procedural Issues</b></p> <p>Was the dismissal procedurally unfair Yes <input checked="" type="checkbox"/> No <input type="checkbox"/></p> <p>If yes, why <u>Santa has not given me the opportunity to learn new Industry 4.1 skills. I am a hard worker and I know that I will be able to learn how to code. Santa has not given me the opportunity to improve my skills.</u></p>												
	<p><b>(b) Substantive Issues</b></p> <p>Was the reason for the dismissal unfair Yes <input checked="" type="checkbox"/> No <input type="checkbox"/></p> <p>If yes, why <u>Santa is merely getting rid of all the old elves. I believe that I am being discriminated against because of my advanced age. I am not 1 200 years old any more but that does not mean that I cannot do the work.</u></p>												
	<p><b>8. RESULTS REQUIRED</b></p> <p>Reinstatement. The North Pole is my home and there is no other employer where I will be able to work. I love Santa very much and I know that he will be happy with me once I have mastered some new skills.</p>												
	<p><b>9. SECTOR</b></p> <p>Indicate the sector or service in which the dispute arose</p> <table border="0"><tr><td><input type="checkbox"/> Retail</td><td><input type="checkbox"/> Safety/Security (Private)</td></tr><tr><td><input type="checkbox"/> Mining</td><td><input type="checkbox"/> Domestic</td></tr><tr><td><input type="checkbox"/> Building &amp; Construction</td><td><input type="checkbox"/> Food &amp; Beverage</td></tr><tr><td><input type="checkbox"/> Business/Professional Services</td><td><input type="checkbox"/> Transport (Private)</td></tr><tr><td><input type="checkbox"/> Agriculture/Farming</td><td></td></tr><tr><td><input checked="" type="checkbox"/> Other: <u>Christmas</u></td><td></td></tr></table>	<input type="checkbox"/> Retail	<input type="checkbox"/> Safety/Security (Private)	<input type="checkbox"/> Mining	<input type="checkbox"/> Domestic	<input type="checkbox"/> Building & Construction	<input type="checkbox"/> Food & Beverage	<input type="checkbox"/> Business/Professional Services	<input type="checkbox"/> Transport (Private)	<input type="checkbox"/> Agriculture/Farming		<input checked="" type="checkbox"/> Other: <u>Christmas</u>	
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<input type="checkbox"/> Business/Professional Services	<input type="checkbox"/> Transport (Private)												
<input type="checkbox"/> Agriculture/Farming													
<input checked="" type="checkbox"/> Other: <u>Christmas</u>													
	<p>CCMA Case Number: ..... Please turn over </p>												



Parties may, at their own cost, bring interpreters for languages other than the official South African languages, please indicate this under 'Other'.

**This section must be completed**

Section 10 of the Employment Equity Act requires the referring party to satisfy the Commission that he/she has attempted to resolve the dispute internally before referring it to the CCMA.

Resolving a dispute internally may include engagements with management, filing a grievance and/or following any other process as set out in the company policy.

Failure to make reasonable attempts to resolve the dispute will mean the referral is premature and therefore the CCMA may not have jurisdiction or power to determine the dispute.

**10. INTERPRETER SERVICES**

Is an interpreter required

- |                                                          |                                     |                                   |
|----------------------------------------------------------|-------------------------------------|-----------------------------------|
| <input type="checkbox"/> Afrikaans                       | <input type="checkbox"/> IsiNdebele | <input type="checkbox"/> IsiZulu  |
| <input type="checkbox"/> IsiXhosa                        | <input type="checkbox"/> Sepedi     | <input type="checkbox"/> SeSotho  |
| <input type="checkbox"/> Setswana                        | <input type="checkbox"/> IsiSwati   | <input type="checkbox"/> Xitsonga |
| <input type="checkbox"/> Sign Language                   | <input type="checkbox"/> Tshivenda  |                                   |
| <input checked="" type="checkbox"/> Other: <u>Elvish</u> |                                     |                                   |

**11. DISCRIMINATION MATTER**

If it is a discrimination dispute, have you attempted to resolve the dispute?

Yes ☒ No ☐

If yes, specify steps taken to resolve the dispute and if no, provide reasons for not attempting to resolve the dispute internally:

**In addition to this being an unfair dismissal matter, I was discriminated against based on my**

**age. Santa is simply getting rid of all the old elves.**

(If written confirmation is available, please attach)

**12. CONFIRMATION OF ABOVE DETAILS**

Form submitted by:

**Floppy the Elf**

(please print name)

Signature: **Floppy**

Position: **Toy maker**

Date: **10 September 2020**

Place: **North Pole**

# 11

## *Santa Claus, the Perennial Ageist: A Human Rights Perspective on Widespread and Systematic Age- Based Discriminatory Practices and Policies by Santa and his Elves*

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Werner Nel

### *1. Introduction*

The vivacious melody of "Jingle Bells" in the background and the joyous laughter of children in the family room gathered around the tree-shaped alter of gifts. In due course, each child will be enveloped with piles of gifts from Santa Claus, from remote control cars to the latest trend in Barbie dolls, the circumference of a local toy shop crammed onto the living room floor. When the time finally comes, each child rips ferociously through the Christmas gift-wrapping, carefully chosen by Santa's Elves, to divulge yet another visible and tangible representation of the highly unlikely supposition that each of them was well-behaved boys and girls in the bygone year. All the while the adults watch in shock and awe while silently pondering a range of perplexing questions: Why did I have to grow up? Why does Santa only bring gifts for the children, was I not "good" this year? What did I do wrong? And finally, why am I being marginalised and excluded from this colourful over-indulgence? After all, as Anne Frank wrote, "No one has ever become poor by giving"—so there's no reason why Santa should not include adults in this festive giving. Therefore, having contemplated

these enigmatic conundrums throughout many Christmases', the simple truth behind this widespread and insidious practice is a matter of human indignity, not necessarily the inadequacy of adult behaviour. In other words, instead of blaming ourselves and regretting the slow process of deterioration with age, we should recognise the true culprit, Santa Claus, the perennial ageist. In this article, a human rights perspective on the exclusionary and controlling generosity of gift-giving by Santa and his Elves exposes the indignity of adult marginalisation, exclusion and prejudice as a result of institutionalised age-based discriminatory policies and practices.

## 2. *The applicable legal standards regarding equality and non-discrimination based on age*

Equality is one of the 'architectonic principles' of human rights and aligns with the concept of normative universalism (Bielefeldt *et al*, 2016), in terms of which all members of the human family are endowed with inherent dignity, which entitles them to equal treatment and enjoyment of rights (*ibid*). The principle of equality thus filters through all human rights and freedoms and can be said to be applicable in all spheres of government, all circles of society, and in the everyday life of all persons. Freedom from discrimination requires equal respect and equal concern for everyone's rights and freedoms. However, non-discrimination is not upheld merely with 'identical treatment'. There may be instances where differential treatment is necessary to attenuate or suppress conditions that perpetuate discrimination (Bielefeldt, 2013). Therefore, non-discrimination "primarily requires systematic endeavours to eliminate all forms of discrimination" (Bielefeldt *et al*, 2016).

As a foundational provision of a sovereign, democratic South Africa, the attainment of human dignity and the achievement of equality are listed amongst the first values in the Constitution (section 1 of the Constitution of the Republic of South Africa, 1996). In furtherance of equality, section 9 guarantees the full and equal enjoyment of all rights and freedoms, and prohibits horizontal unfair discrimination, directly

or indirectly, against anyone on one or more of the listed grounds, which includes, *inter alia*, age. In addition, subsection 5 presumes that discrimination on the ground of age is unfair unless it is established that the discrimination is fair.

Section 9(4) of the Constitution provides that national legislation must be enacted to prevent or prohibit unfair discrimination. In giving effect to this constitutional obligation to the right to equality, the Employment Equity Act 55 of 1998 ('EEA'), the Labour Relations Act 66 of 1997 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), was enacted. The first two statutes deal specifically with discrimination in the context of employment, while the third deals with discrimination in the broader society. PEPUDA was enacted to fulfil three broad objectives, namely: the prohibition of unfair discrimination, to provide access to justice and effective remedies for the victims of unfair discrimination, and the promotion of substantive equality.

Based on these provisions, all individuals in South Africa are protected against age-based discrimination. There are various routes to challenge unfair discrimination based on age, including (Agediscrimination.info/South Africa - <http://www.agediscrimination.info/international-age-discrimination/south-africa>):

- Filing a complaint with the South African Human Rights Commission ('SAHRC');
- Referring a dispute to the Equality Court;
- Challenging unfair discrimination through the various employment law dispute resolution bodies, if relevant.

According to a report by the SAHRC for the 2015/2016 financial year, 3% of the complaints of unfair discrimination lodged were based on age. In the public service sector, 4% of the employment-related disputes referred to the Commission for Conciliation Mediation and Arbitration concerning allegations of unfair discrimination based on age (*ibid*).



International human rights instruments categorically insist upon equality and non-discrimination and are therefore expounded in a range of international human rights instruments (e.g. *Universal Declaration of Human Rights* (adopted in 1948), the *International Covenant on Civil and Political Rights* (ICCPR, 1966) with its two Optional Protocols and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR, 1966)).

### 3. *Age as a listed ground of discrimination*

'Age', implying a certain duration of existence, is a changing characteristic of humanity (Rishworth *et al*, 2003). Age has the effect that its burdens and benefits are shared across the entire population: everyone is at a point in their life subject to certain age restrictions, such as driving, marrying, voting, or drinking alcohol (Albertyn, 2002). However, while such restrictions are normatively justified as serving a legitimate purpose, viz. the protection of the minors themselves, such an argument is difficult to fathom in the context of aged-based exclusionary gifting. This will be considered in more detail later.

Aged-based discrimination or ageism (Butler 1969 and Butler 2011) is the stereotyping, prejudice, and discrimination against individuals or groups based on their age (World Health Organization - <https://www.who.int/ageing/ageism/en/>). It may take many forms, including prejudicial attitudes, discriminatory practices, or institutional policies that perpetuate stereotypical beliefs. Ageism is a widespread and insidious practise that is considered one of the most pervasive prejudices across human society, and which has harmful effects that may even result in the denial of basic human rights of people from certain age groups. Manifestations of ageism are frequently cited in workplace situations, where "younger adults may have difficulty finding jobs and receive lower pay due to their perceived lack of experience, while older adults may have problems achieving promotions, finding new work, and changing careers" (Duncan *et al*, 2000).

Differentiation and discrimination seem to be an inherent flaw in human nature. The origins, forms and contemporary manifestations of discrimination and related intolerance are complex and multifaceted. It can take various forms, ranging in severity and harm, including distinction, exclusion, restriction, hostility or differential treatment based on age identity. Eventually, whether as its purpose or as its effect, discrimination will result in the nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

#### 4. *The enquiry into a violation of the right to equality in the present case*

Based on the decision of the Constitutional Court in *Harksen v Lane* NO 1998 (1) SA 300 (CC), the following stages of enquiry into the alleged violation of equality should be considered *in casu*:

- (a) Does the policies and practices of exclusionary gift-giving differentiate between people or categories of people? In the present case, this question must be answered affirmatively. Santa's policies and practices of exclusionary gift-giving differentiates between adults and children. In other words, the differentiation is based on one of the specified grounds, *viz.* age, and is therefore *prima facie* unfair unless the contrary is proved (Currie and De Waal, 2013).
- (b) Does the differentiation bear a rational connection to a legitimate purpose? This stage should be broken up into several subsections, (1) it is necessary to consider the purpose of the practice of exclusionary gift-giving, (2) whether that purpose is a legitimate one and, (3) if so, whether the differentiation does have a rational connection to that purpose.
  - (i) Tradition has it that Santa brings gifts to the homes of well-behaved children on the night of Christmas Eve or during the early morning hours of Christmas Day. Therefore, the main purpose of Santa's gift-giving has proverbial strings

attached, intended to ameliorate children's' behaviour through controlling generosity and emotional blackmail.

- (ii) If you ask any fair-minded parent, such a purpose seems undeniably reasonable and even necessary to control bored, overindulged children during the long Christmas school holidays.

Although the purpose of Santa's exclusionary gift-giving to children is a legitimate one, the differentiation does not seem to have a rational connection to that purpose. While it may be conceded that controlling generosity through gift-giving serves an important role in improving behaviour, there seems to be no rational basis why such a practice should exclude adults. In fact, some research has concluded that such an unspoken social contract to reward well-behaved adults, may reduce the crime rate by up to 85% and adult obesity by 72% (Layman's Institute for Adult Research, 2019). In addition, as children near the age of adulthood, they subconsciously realise the impending exclusion associated with adulthood, resulting in various psychological and emotional disorders. As a result, the same research concluded that gift-giving to reward well-behaved adolescents will seriously decrease tendencies of under-age drinking, premarital sex and pregnancies, and even improve parent-teen relationships.

- (c) Considering that the discrimination is based on a specified ground, unfairness is presumed. The presumption of unfairness as a result of discrimination based on a specified ground is not conclusive proof that the discrimination is in fact, unfair. Consequently, the discrimination must have an unfair impact, including the extent to which the rights of adults have been impaired and whether there has been an impairment of their fundamental dignity. Equality itself is derived from the inherent dignity or worth of the human person, implying that every person is inherently entitled to recognition and respect as holders of certain inalienable rights and freedoms (United Nations General

Assembly, 1966). It is clear that the age-based exclusionary gifting implies not only an impairment on the right to equal treatment but amounts to a prejudicial practice in terms of which adults experience certain economic harms and denials of access to certain patrimonial interests.

- (d) During the final stage of enquiry, a determination will have to be made as to whether the unfair discrimination outlined above, can be justified under the limitations clause (section 36 of the Constitution). However, considering that the constitutional value of equality is derived from the inherent dignity of the human person, and thus from the same normative axiomatic principles, unfair discrimination is nearly impossible to justify in terms of the related criteria used to adjudicate the legitimacy of a limitation of the right to equality in terms of section 36. As Currie and De Waal note: "It is, for instance, difficult to see how discrimination that has already been characterised as 'unfair' because it is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings can ever be acceptable in an open and democratic society based human dignity, freedom and equality" (Currie and De Waal, 2013)

## *5. Conclusion*

Santa Claus is generally depicted as a portly, jolly, white-bearded man carrying a bag full of gifts for children. While no one would deny any child this joyful privilege of Christmas, there is no legal justification or rationality for the exclusion of adults from this practice. As such, exclusionary gifting to the recipient based solely on their youthful age, is an institutionalised policy of age-based discrimination. Santa's primary purpose, to bring gifts to the homes of well-behaved children, is clearly biased and subsequently prejudicial to adults. Adults are fully capable of committing to a gift-based incentive for "good" social and moral decorum. As such, Santa Claus must include all adults throughout the world on his list, categorising them according to their behaviour, and accordingly deliver presents, including toys and candy,

to all of the well-behaved men, women and children, and coal to all the misbehaving individuals, on the night of Christmas Eve.

An individual or identifiable group who alleges having been discriminated against based on age is entitled to institute proceedings in the Equality Court. It is thus recommended that a class action claim be brought in terms of section 38(c) of the Constitution, which provides that 'anyone acting as a member of, or in the interests of, a group or class of persons' has the right to approach a competent court to allege that a right in the Bill of Rights has been infringed or threatened. Based on the alleged violation of age-based discrimination outlined above, section 21(2) of PEPUDA provides for various remedies that may be combined to ensure effective relief, including declaratory orders, interim orders, declaring a settlement agreement an order of the court, or ordering the payment of damages. As a starting point, the court may be approached for an order to direct Santa and his Elves to make an unconditional apology to all adults that have suffered discrimination based on their age and for restraining the continuation of this unfair discriminatory practice. More compelling relief could also be considered, such as a prohibitory interdict restraining Santa and his helpers from distributing any gifts during the coming Christmas period.

In conclusion, recognizing the inherent dignity and equal and inalienable rights of all members of the human family requires an all-inclusive and non-discriminatory policy of Christmas gifting for all ages, which serves an important role in improving behaviour.

## 6. *List of references*

Butler RN "Age-ism: Another form of bigotry" (1969) 9 *The Gerontologist* 243.

Butler R *The Longevity Prescription* (Avery (2011)).

Albertyn C 'Equality' in Cheadle H, Davis D and Haysom N (eds) *South African Constitutional Law: The Bill of Rights* (Butterworths (2002)) 93.

Agediscrimination.info/International/Africa/South Africa (Accessed: 2 October 2018).

Bielefeldt H "Misperceptions of Freedom of Religion or Belief" (2013)35  
*Human Rights Quarterly* 33.

Bielefeldt H, Ghanea N & Wiener M *Freedom of Religion or Belief: An  
International Law Commentary* (Oxford University Press (2016)).

Constitution of the Republic of South Africa, 1996.

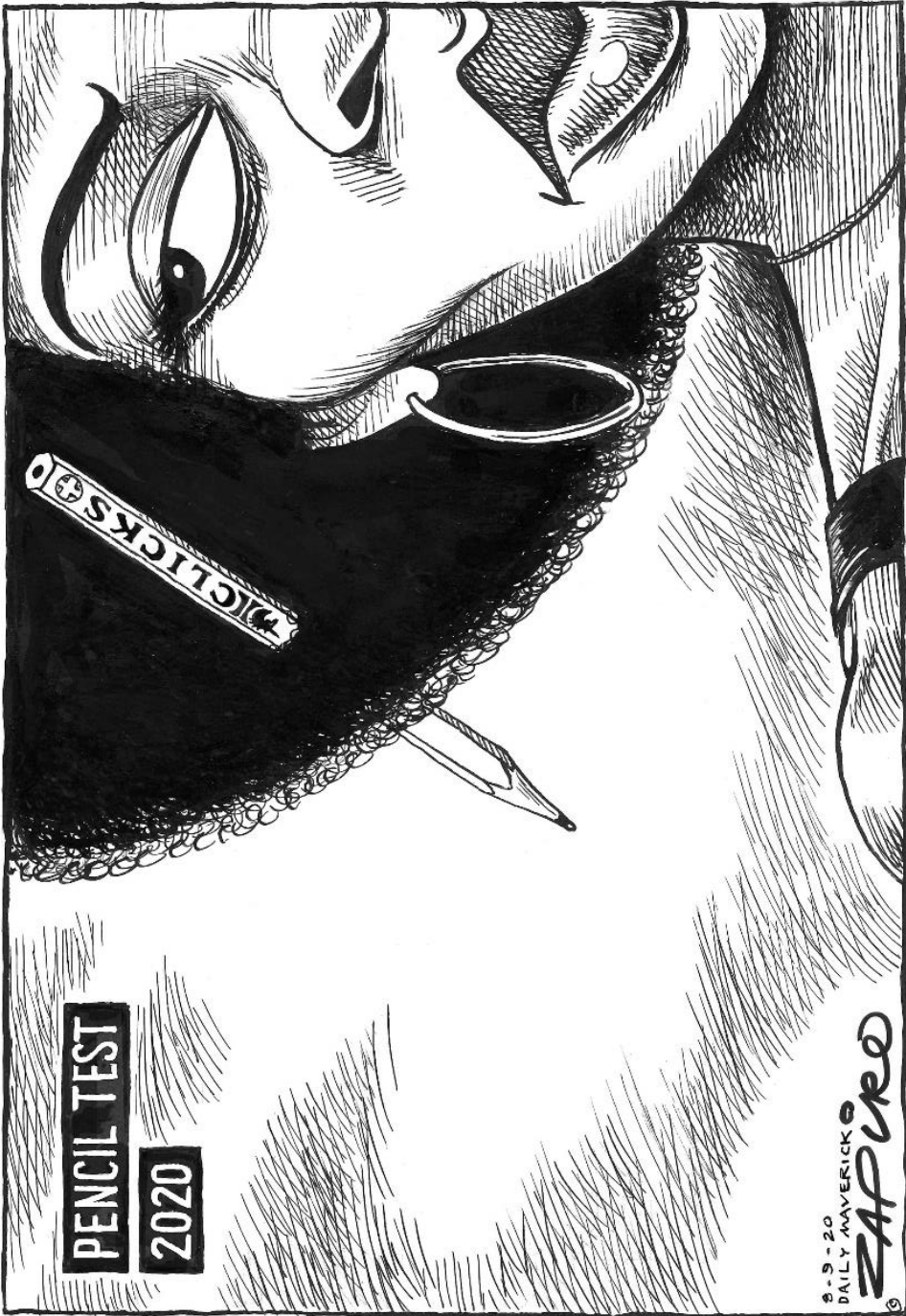
[http://www.agediscrimination.info/international-age-discrimination/south-  
africa](http://www.agediscrimination.info/international-age-discrimination/south-africa) (Accessed: 25 August 2020).

International Covenant on Civil and Political Rights (ICCPR, 1966) with its  
two Optional Protocols.

International Covenant on Economic, Social and Cultural Rights (ICESCR,  
1966).

Rishworth P, Huscroft G, Optican S and Mahoney R *The New Zealand Bill of  
Rights* (Oxford University Press (2003)).

Universal Declaration of Human Rights (adopted in 1948).







## *Part 4*

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*Gender, Culturally and Politically  
insensitive Mr Claus*



# 12

## *We Wish you a Feministmas: An open Letter to Santa Claus*

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*Leoni van der Merwe*

Dear Santa Claus,

While I am aware that the South African branch of your North Pole office is usually inundated with peculiar requests all the way from Tietiesbaai to Tweebuffelsmeteenskoot-morsdoodgeskietfontein, this is perhaps the most significant correspondence that you have received to date. As you may have noted, the global expansion of movements, such as *#MeToo*, *#MenAreTrash*, *#HeForShe*, *#EverydaySexism*, *#ImWithHer* and *#TimesUp*, to protest sexual assault, sexism, misogyny, abuse and patriarchy are indicative of a new breed of feminism. While the extent of the mistreatment suffered by women may not always come to light for a multitude of reasons, one thing is a universal truth - women experience varying forms of inequality in their personal and professional capacities, regardless of their race, age, sexual orientation, marital status, ethnicity, pregnancy status, level of education, profession or income level.

You may also deliver a few gifts to women who have fought or are still fighting for women's rights around the world such as Simone de Beauvoir, Ruth Bader Ginsburg, Beyoncé, Theresa Kachindamoto, Leona Theron, Murunwa Mutele and Lilian Ngoyi to name a few. I do not doubt that Beyoncé's music and concert tickets, with feminism-inspired themes, are in high demand in your workshop at an unprecedented rate. I digress. Matters of systemic discrimination, bias and sexism are often difficult to articulate succinctly as women are

often burdened with the mental toll that comes with speaking up about injustices in society (Hackman, 2016). Candy canes and trifles aside, without any sugarcoating, this letter seeks to ascertain why your office employs so few female elves?

## 1. *Women in employment*

In your capacity as an employer in South Africa, it is of the utmost importance that I highlight our current employment equity landscape in this plight to you. In 2019, the International Labour Organization (ILO) highlighted that women across the world have lower chances of securing employment as compared to their male counterparts (ILO, 2019). At a national level, the global picture by the ILO is more severe. Year-on-year, South African women account for higher rates of unemployment in society (Statistics South Africa, 2018). In instances where women are fortunate to receive employment opportunities in South Africa, it is usually not in the absence of a substantial gender pay gap. During 2018, women earned approximately 28% less than their male equals (ILO, 2018). PricewaterhouseCoopers (2019) in its latest trends report on executive directors highlights that only 3.3% of chief executive officers of entities on the Johannesburg Stock Exchange are women. Now, now – let me hasten to add that I am not suggesting a dramatic, military-style *coup d'état* of your Jeff Bezos-esque position. I am merely asking for pragmatism and a *soupçon* of your generous and transformative Christmas spirit. Is that too much to ask?

## 2. *A brief history of Santa's Elves*

As you are aware, the origin of the concept of Santa's elves can be traced back to prior to the mid-1800s when house gnomes were utilised by homeowners to ward off evil (Jakobsson, 2015). After the 1850s, these gnomes underwent the proverbial makeover as a result of the literature of numerous prominent authors. Literature and Christmas carols have taught us that you utilise the services of extremely intelligent and efficient elves in your workshop. Your very first elves were identified as Alabaster Snowball, Bushy Evergreen,

Pepper Minstix, Shinny Upatree, Sugarplum Mary and Wunorse Openslae. While there are varying and vague accounts about the actual number of elves and their functions, for intellectual property and competition law reasons I imagine, it remains apparent that your employment equity practices leave much to be desired in our pluralistic democratic dispensation. Of the six elves listed above, Sugarplum Mary is widely identified as the only female elf employed in your workshop. She is often referred to, in correspondence from your office, as a great cook and the top assistant to Mrs Claus, whereas the remaining five elves are often described as competent engineers, academics, security specialists and the like. This description by your office reinforces the patriarchal view of the "...prevailing societal echelons where women are relegated to the traditional subordinated roles" (Wonci, 2019, p 1). This description by your office is also contrary to the view shared by the Commission for Gender Equality that:

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"Women make enormous contributions to economies, whether in businesses, on farms, as entrepreneurs or employees, or by doing unpaid care work at home. Despite their immense contribution, they remain disproportionately affected by poverty, discrimination and exploitation" (2018, p 64).

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### 3. *The legal framework*

It would be remiss of me not to bring our South African employment equity legal framework to your attention. The Constitution of the Republic of South Africa, 1996 as the supreme law of our country serves as the litmus test for all other laws. Section 9 of the Constitution provides that:

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"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).

(3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair" (1996).

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While I am aware that you read large volumes of correspondence with outlandish Christmas requests for new spouses, snow and sports cars daily, and that you probably require some Christmas sherry and cheer at this juncture, the abovementioned section is imperative when interpreting your role as an employer. I have received hundreds of reports from women who have applied for the prestigious position of the elf at your workshop and have all been denied employment opportunities based on their gender alone. This practice contravenes section 9(4) and (5) of the Constitution of the Republic of South Africa, 1996. Section 9 of the Constitution is to be read with the Employment Equity Act, 55 of 1998 as the primary piece of legislation that has been implemented to eliminate unfair discrimination in the workplace and to implement affirmative action measures.

Upon further investigation of the brief legal framework set out above and the evidence at hand, it is unmistakable that your organisation's failure to employ female elves is not related to an inherent requirement of the job or the implementation of affirmative action measures as set out in section 6 (2) of the Employment Equity Act, 55 of 1998 (the Act). Additionally, you have also been identified as a designated employer in terms of section 13(1) of the Act that requires you to implement affirmative action measures in relation to Black people, women and persons with disabilities who are suitably qualified South African citizens. These persons are collectively known as 'designated persons'.

In terms of section 15(1) of the Act, designated employers are required to ensure that suitably qualified designated persons have equal employment opportunities and are represented across all occupational levels and categories.

If you remain unconvinced by my argument thus far, please consult the matter of *Rustenburg Platinum Mines Limited v UASA obo Pietersen and Others* (2018) 39 ILJ 1330 (LC). While this case relates to sexual harassment, Tlhotlhemaje J delivers a compelling argument for legal practitioners and society to consider the workplace through the perspective of women and the various global movements that have sprouted in recent years to combat the discrimination that we face. I am certain that you are very proud of the work that your organisation performs daily but, could you possibly imagine being denied your position as Santa Claus of the world at large simply because of your gender or any other factor such as your race, age, sexual orientation or marital status?

#### 4. *A case for women everywhere*

To conclude, I would like to bring your attention to a few other well-known women in history who have changed the trajectory of many lives by adding value and being exemplary in their respective professions or trades. Charlotte Makgomo Maxeke was a South African religious leader and social and political activist. She was the first black South African woman to graduate with a university degree and the first black African woman to graduate from an American university. I am certain you have delivered some Christmas cheer to Charlotte Maxeke Academic Hospital, named after her of course. In 1843, Ada Lovelace developed the world's first computer algorithm, which, as I am sure you are well aware, forms the basis of your extensive operation, especially when using artificial intelligence techniques and social media to deliver gifts to all the corners of the world.

Most recently, in 2019, Katie Bouman developed an algorithm named 'CHIRP' that allowed researchers to take the world's first image of a black hole. A quick question, Mr Santa Claus – did you know that the

technology that allows us to screen telephone calls before deciding to answer the telephone was also invented by a woman known as Shirley Ann Jackson in the 1970s? I am certain that your office has a very rigorous telephone screening policy to avoid calls from disgruntled children who have been gifted incorrect or dissatisfactory toys on Christmas? Sometimes being employed in customer service is the pits. While countless women could be added to the above list, my point is to demonstrate how valuable women can be, not just for what we can do but simply because of who we are. Creating additional employment opportunities for women within your workshop would not only lead to increased equality and transformation but could also engender the identification of operational efficiencies and synergies as well as a culture of inclusivity and diversity. As Desmond Tutu rightfully states: "If we are going to see real development in the world, then our best investment is women".

If all else fails and you don't agree that a feminism-based approach could be the gift that keeps on giving in your workshop as I have explained herein; Dear Santa, Kind Sir, at the very least please consider sending myself and other feminists across the world a Beyoncé album this Christmas. We require a new, upbeat soundtrack to drown out the monotony of our daily misogynistic and patriarchy-filled experiences. I look forward to your response and humbly request that you never doubt what us women bring to the table because, as my letter reminds you, we are the table!

Kind regards,  
A Tired Feminist



#### 4. List of references

- Commission for Gender Equality (2018) *Annual report 2017/18*. Available at: <http://www.cge.org.za/wp-content/uploads/2014/09/CGE-Annual-Report-2018-Final-web.pdf>. (Accessed: 26 August 2020).
- Constitution of the Republic of South Africa, 1996.
- Employment Equity Act 55 of 1998.
- Hackman R (2016) "The struggle to speak up: how women are pushed to de-escalate sexist incidents". *The Guardian*. 12 May. Available at: <https://www.theguardian.com/world/2016/may/12/women-sexual-harrassment-sexism-deescalation>. (Accessed: 27 August 2020).
- International Labour Organisation (2018) *World employment social outlook*. Available at: [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_619577.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_619577.pdf). (Accessed: 27 August 2020).
- International Labour Organisation (2019) *Global wage report 2018/19*. Available at: [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_650553.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_650553.pdf). (Accessed: 27 August 2020).
- Jakobsson Á (2015) *Elves: from the Eddas To Legolas*. M.A. Dissertation, University of Iceland. Available at: <https://skemman.is/handle/1946/23361?locale=en>. (Accessed: 27 August 2020).
- PricewaterhouseCoopers (2019) *Executive directors: Practices and remuneration trends report*. Available at: <https://www.pwc.co.za/en/assets/pdf/executive-directors-report-2019.pdf>. (Accessed: 26 August 2020).
- Rustenburg Platinum Mines Limited v UASA obo Pietersen and Others* [2018] 39 ILJ 1330 (LC).
- Statistics South Africa (2018) *Quarterly labour force survey*. Available at: <http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2018.pdf>. (Accessed: 1 September 2020).
- Wonci T (2019) South Africa has a long history of gender discrimination. *The Independent Online*. 29 April. Available at: <https://www.iol.co.za/business-report/opinion/south-africa-has-a->

long-history-of-gender-discrimination-22170778. (Accessed:  
26 August 2020).

# 13

## *Santa the only Acceptable Witch: Cookies, Sweets, Gifts and All*

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*Phaladi Magongoa*

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"Twas the night before Christmas"

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### *1. Introduction*

Santa Claus, also known as Father Christmas, is a legendary character originating in Western Christian culture who is said to bring gifts to the homes of the well-behaved children on the night of Christmas Eve or the early morning hours of Christmas.

The modern belief is that Santa Claus frequent the shopping malls and public places during the festive season, that kids are encouraged to take pictures with him during this period in preparation for the special delivery on Christmas Eve. Children are warned that if they do not take pictures with him then he will not deliver sweets and gifts when the day comes.

Santa is associated with Christmas celebrations and although according to Macedo (2017) the holiday began as a celebration of the birth of Jesus Christ, many celebrate Christmas regardless of their religion. Christmas in itself is celebrated in many different ways around the world.

It is therefore evident that Santa, the most iconic figure of the season also has many guises to keep up with the developments and world evolutions. *There are many magic ways up Santa's sleeves.*

## 2. *How he does the work?*

Santa Claus is said to live at the North Pole with his wife, where he spends the year making toys with the help of his elves. There he receives letters from children all over the world asking for Christmas gifts. On Christmas Eve, he loads his sleigh with toys and flies around the world, drawn by eight reindeers, stopping at each child's house, he slides down the chimney and leaves the gifts, refreshing himself with the milk and cookies left for him by the household's children.

He begins his deliveries promptly at midnight on Christmas day, December 25<sup>th</sup>. Meaning at night, twelve' o clock on the 24<sup>th</sup> of December. Firstly, it is culturally unacceptable to many Africans for anything to happen at night while people are sleeping. Unless, in a case of death and funeral preparation, then a night vigil can be held at night until the wee hours of the morning. Besides, in the aforementioned reason, socially in the African culture, Santa would be labelled a witch, if seen or identified. For it is said that if children are still awake then Santa will pass the houses where children are not sleeping. He returns later, but only when the children are asleep.

The children are made to sleep on Christmas Eve so that they do not miss out on the gift. The elders are privy to Santa's practices and they put children to bed for "*dilo tsa boshego*" (nocturnal activities) to take place. Contrary to the societal beliefs, they accept and allow the children to accept the gifts. Santa is indeed an acceptable witch and one who is welcomed by the entire family not only children. On other occasions, anything left or delivered at night would be frowned upon. The deliveries would be associated with *tokoloshe* (evil spirit) or ghost dealings. If deliveries are only made when recipients are asleep, these gifts would be taken to an *inyanga* (traditional healer) to be checked if they are poisoned or possessed by evil spirits. The delivered consignments would not be touched or moved. The *inyanga* would have to be called to the scene to cleanse and chase away any evil that may have come with "*dilo tsa boshego*".

According to Macedo (2017), in Italy, they have a different Santa identified as *La Befana*, a friendly witch who comes by on January 5<sup>th</sup>

to deliver sweets and toys. She flies around on a broomstick and slides down chimneys to deliver presents to nice children and coal to the naughty. *La Befana* is a female Santa and she will even sweep around the house before leaving. In return, families leave wine and plates of food instead of cookies and milk as a treat for *La Befana*.

Across the world and as commonly known Santa uses his reindeers to fly for quick deliveries (Kennedy - <https://www.fluentin3months.com/international-santa>).

Reindeers can't fly under normal circumstances but Santa's are special. Because of magic, they can fly very high and very far without getting tired. Again, it is acceptable for Santa to fly across houses using a mode that is not meant for flying. This is witchcraft. If something that cannot fly suddenly can fly from high and far without getting tired, this can only be as a result of a spell. The secret of witches' flying had little to do with their broomstick and a lot to do with a concoction called 'flying ointment'.

A question thus can be asked is Santa himself is a witch and has managed to get the concoction for the reindeer to enable them to fly.

Society believes that a witch can fly between cities the whole night and still be able to function perfectly the next morning, without having a feeling of fatigue. If something doesn't have wings then it can't and shouldn't fly.

Someone sprinkle 'holy water'. Things are getting out of hand!

Santa slides down the chimney, while not even the back door is an acceptable access point culturally. The polite practice is if a guest arrives at the door and knock, they then await for those inside to open the door of the building to let them in. Santa welcomes himself! It is rude and disrespectful to enter people's homes without permission or being welcomed by those inside the building. However, not only does Santa access people's homes through improper ways, but he also enters these houses without permission. This is well known among the young and the old but no one points it out or makes an attempt to stop it.

### 3. *Conclusion*

If Santa is not to be seen or heard when he makes his deliveries, then maybe he must take advantage of the technology and make use of the online gift delivery services. He can choose to remain anonymous with his gift and maybe sign off the gift as usual 'xoxoxo Santa'.

In the modern era, society is encouraged to believe in Father Christmas as any figure or form to bring gifts to children and replace Santa. That figure is at times a known relative or even a parent, thus they do not have to stay awake in hope on Christmas Eve. It is difficult to convince children of the magic that is Santa as they are now privy to the customs around the Christmas period, they gain knowledge from the internet and friends. Can it be that modern-day technology will be the death of Santa? *Santa changes but Santa never dies!*

### 4. *List of references*

Kennedy S "Naughty or Nice? How 'Santa' Looks in other cultures".

(24 December 2017). Available at:

<https://www.fluentin3months.com/international-santa>. (Accessed: 14 October 2020).

Macedo M "Santa around the world: How different cultures celebrate Christmas". Available at: <https://www.boston25news.com/news/santa-around-the-world-how-different-cultures-celebrate-christmas/668401254/>. (Accessed: 14 October 2020).

# 14

## @Santa, Fyi, Black Lives Matter

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*Letlhokwa George Mpedi*

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*"Senzeni na?*

*Sono sethu, ubumnyama?*

What have we done?

Our sin is that we are black?"

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### 1. Introduction

I did not know that Santa Claus had a sidekick called Black Pete ('Zwarte' Piet in Dutch) until one fateful afternoon when the duo stepped into our train carriage on our way from Salzburg (Austria) to Munich (Germany). My colleagues could not understand why I did not know of or about Black Pete. To me, having grown up in South Africa, Santa sans his reindeer is a loner. It was a shock to see a sad figure with a black painted face carrying a sack and walking timidly behind a cheerful Santa. This was a miserable and painful sight for me. I have seen and experienced a lot of strange things during my sojourn in Munich, particularly at the Hofbrauhaus (HB). Yes, the same old Bavarian HB where Adolf Hitler made his revolting speeches. For example, I had drunk *Fränkisch* (Franconian) men calling me *Schwarzer Mann* (a black man) at the HB. Yes, I am a black man. However, I have names that my grandmother gave me. Secondly, it is impolite to approach a man and start calling him by his race, especially when he is minding his important business, i.e. irrigating his tonsils and enjoying "*In München steht ein Hofbräuhaus, eine, zwei, g'suffa!*" ("There's a

Hofbräuhaus in Munich - one, two, down the hatch!"). Hell, this is a story for another day.

The event on the train got my mind working overtime. What is this strange 'partnership' supposed to mean? And, why did the other fellow paint his face black? These are some of the questions that were going through my mind. As I was trying to make sense of the situation I was witnessing, he, Black Pete, gave me a handful of groundnuts. This gesture left me confused. The truth is that I was wondering if this was altruistic or malevolent? I guess that I will never know. At any rate, my colleagues and fellow travellers could not comprehend why I was astonished. To them, black paint is inherently necessary for the role. It is *Black Pete* anyway. Secondly, this is part of their 'culture' and 'tradition'. They told me that Santa and Black Pete are something that was part of their childhood. Their opinions aside, the truth of the matter is that I have never managed to get over that ordeal. In this chapter, I try, albeit modestly, to go back in time and confront one of the most prickly experiences of my life.

## *2. Black Pete is a racist figure*

As mentioned above, Santa in South Africa is a lone wolf. What I do not understand is why in Europe he would prefer walking around with a man whose face is painted black. Yet, he acts as a one-man crew when he graces our shores. Does this mean that he knows that his actions are or will be offensive to the local (black) folks? Secondly, is he alive to the fact that he will not get away with this reprehensive conduct on the African soil? My hunch is that Santa's antics are premeditated. Enough with conjectures. However, who is Black Pete and why is he a racist figure that Santa should stop spending time with? Black Pete is a black-faced assistant of Santa. He shows up every year in countries such as the Netherlands with gifts and sweets for the children (Van den Berge, 2018). Black Pete is a racist figure for a range of reasons which are too numerous to address here. The entire charade evokes sad memories of black suffering which include slavery and colonialism. Those who see nothing wrong with this sort of disgraceful behaviour can call me ultrasensitive if they like. However, wrong is



wrong. This folly is an “expression of racism and discrimination related to enslavement” (United Nations, 2015). As rightly pointed out in the Report of the Working Group of Experts on People of African Descent on its visit to the Netherlands “[t]he image of Black Pete stereotypes Africans and people of African descent in image and behaviour” (*ibid*). In a nutshell, the whole Black Pete spectacle is offensive to the core and reopens old wounds. Therefore, it **can’t, shouldn’t** and **won’t** be tolerated.

### 3. *Santa Claus, Santa Claus, watcha gonna do when the fighters come for you?*

Now that I have stated what is wrong with this Black Pete business, I think that Santa can learn a thing or two from the recent Clicks “natural hair” matter (see Ramsunder, 2020), Showmax’s removal of Leon Shuster’s films with blackface characters (see Ferreira 2020) and the H&M “monkey hoodie” saga (see Head, 2018). Santa might argue that he does not “parade” Black Pete in South Africa. Therefore, he is good and South Africans like me have no reason to complain. Well, such a line of thinking will not cut it. It is tantamount to a situation where a fashion house encourages its customers, usually in wealthy countries, to buy its products which are known to be manufactured in sweatshops, usually in developing countries. If this does not jolt Santa’s conscience back to that of an upright human being, then I invite him to take his sleigh and visit the Cape Coast Castle and Elmina Castle in Cape Coast (Ghana) and Goree Island (Senegal). I have been there and I can tell you that what happened to women, men, children and families at the aforementioned places is hair raising and should not be romanticised in any shape or form. From West Africa, I invite Santa to head south and spend some time at the Apartheid museum and learn something about this crime against humanity. From there, I would urge him to cross the Atlantic ocean and head to the Americas. While flying over the Atlantic Ocean, I recommend that he plays The O’Jay’s song “Ship Ahoy” at full blast. The fact of the matter is that there are more than enough harrowing stories on slavery and colonialism almost everywhere in the world. Should the foregoing not serve as a

persuasive nudge for Santa to change his heart and mind about Black Pete, then the fighters should and will intervene. They always do. He must ask Clicks and H&M.

#### 4. *Repent or don't show your face here!*

Dear Santa, haven't black people suffered enough? You are a global figure; use your reach to unite the nations. In this world, which is full of hatred and bigotry, we need love, peace and happiness. I think Mama Africa, the late Zenzile Miriam Makeba, was talking to people like you when she said, "unify us – don't divide us". So, what is it going to be Santa? You have two options in as far as I see it. You either change your obnoxious ways and, *inter alia*, retire Black Pete with immediate effect or do not come to South Africa. Finish and *klaar!* Black lives matter!

#### 5. *List or references*

Ferreira T (2020) "Showmax removes 9 Leon Schuster films with blackface characters that MultiChoice's video streaming service is reviewing over racially insensitive content". Available at:

<http://teeveetee.blogspot.com/2020/06/showmax-removes-9-leon-schuster-films.html> (3 November 2020).

Head T (2018) "100 days later: What H&M are doing to atone for the "monkey" hoodie". Available at:

<https://www.thesouthafrican.com/lifestyle/what-are-hm-doing-to-say-sorry/> (3 November 2020).

Ramsunder V (2020) "I am deeply disappointed and apologise for the images - Clicks Group CEO". Available at:

<https://www.news24.com/news24/opinions/letters/open-letter-i-am-deeply-disappointed-and-apologise-for-the-images-clicks-group-ceo-20200907> (3 November 2020).

United Nations Report of the Working Group of Experts on People of African Descent on its Sixteen Session (Addendum): Mission to the Netherlands (United Nations (2015)).

Van der Berge L "Dealing with ambiguity: John Maurits, Black Pete and the Crisis of Dutch identity" (2018) 47 *Netherlands Journal of Legal Philosophy* 3.

SUN TIMES  
2.5-12-11  
thx Toby S-11  
4 techno stuff

© Zapire

...Plz bring me iPhone 4S  
with Siri FTW. Also HSP4+,  
8MP HDR f2.8 wud be XLNT.  
WOOT! cant w8! Thx Santa.  
PS luv yr reindeer crib.  
YTB. Hi 5!

WE NEED  
YOUNGER  
ELVES!



# Part 5

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*4IR to the Rescue?*



## *Santa's Unlawful Surveillance of People using AI Technologies to Determine Who's Naughty or Nice*

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*Sershiv Reddy*

### *1. Introduction*

This short contribution will analyse how Santa Claus makes use of artificial intelligence (AI) technologies as surveillance on South Africans to determine who is naughty or nice with respect to Christmas gifts. Santa uses drones and AI algorithms on social media to collect data on South Africans, which makes it easier to determine who should receive Christmas gifts. This, however, raises certain privacy concerns concerning the monitoring and collection of private data without a person's consent. The contribution will examine the lawful and unlawful means of using artificial intelligence technologies and collecting data for Santa's naughty or nice Christmas gift list. Although Santa Claus is hailed as a spreader of joy, no one is above the law and he too will be required to abide by the laws of South Africa. The contribution will therefore briefly examine AI and the law, as well as privacy laws in South Africa.

### *2. Santa Claus and Christmas*

We all know who Santa Claus is, whether he goes by the name of St Nicholas, Father Christmas or Mr Claus. He is easily identified by his big stomach, white round beard and red and white clothes with a black

belt and boots. According to resources, Santa lives in the North Pole, where he spends 364 days of the year making toys for everyone with the help of his elves, after receiving letters of wish-listed gifts from everyone across the globe (Tikkanen, 2020). Santa is usually seen flying overhead on his magic sleigh with reindeer into people's homes on Christmas Eve to deliver toys to everyone (History, 2020). He comes down the chimney and leaves the gifts by the Christmas tree and often helps himself to the milk and cookies left for him by the owners of the house (Tikkanen, 2020). The gifts are meant only for the people who behaved well during the year, whilst those who behaved badly would receive a lump of coal.

The 25<sup>th</sup> of December is seen as a religious day by the Christian faith celebrating the birth of Jesus Christ (Badina, 2016). The date is known as Christmas day and has also become popular due to Santa Claus bringing gifts for everyone the night before to open the next day (Hillerbrand, 2020). It is therefore seen as a day of celebration among family members and Santa aims to aid to this joyous occasion by providing gifts to those people who deserve them. The gifts would also be based on what people asked for in letters addressed to Santa at the North Pole.

Although Santa may be historically seen as a figure who brings joy to everyone around Christmas, he may be breaking the law in the performance of his duties. One of these relates to the right to privacy. One source has indicated that Santa breaks into our homes yearly to deliver gifts to all those who have been good throughout the year (Sky History, 2020). When one thinks about this statement one begins to wonder, when did I give Santa permission to enter my home? This article, however, focuses on how Santa determines who gets Christmas gifts by finding out who is naughty and who is nice.

### *3. Santa Claus and artificial intelligence*

We all know the lyrics to the famous song "Santa Claus is coming to town". The music and lyrics were composed by John Frederick Coots and Haven Gillespie and the song was first performed on Eddie



Cantor's radio show in November 1934 (Christmaslyrics.com, 2019). The first three verses of the song are as follows:

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"You better watch out  
You better not cry  
You better not pout  
I'm telling you why  
Santa Claus is coming to town.

He's making a list,  
Checking it twice,  
Gonna find out who's naughty or nice.  
Santa Claus is coming to town

He sees you when you're sleeping  
He knows when you're awake  
He knows if you've been bad or good  
So be good for goodness sake".

---

The song no doubt brings joy to both adults and kids, but have you ever wondered how Santa actually finds out who's naughty or nice? Furthermore, how does Santa know when you are sleeping, awake or have been good or bad? The answer: surveillance. That's right, you heard me; Santa uses various methods to keep tabs on who's naughty or nice and even tracks when you are sleeping or when you are awake. He does this by using different methods of surveillance without people knowing that he is busy watching their every move. Bilchitz argues that technology has become a standard feature in our daily lives both socially and commercially and because of this continuous usage, they exist in both private and public spaces, which in turn may lead our communications to be monitored and tracked (Bilchitz, 2016). The advancement in technology has now allowed Santa to use certain methods to gather information about people. It is through these gatherings that legal concerns are raised. The following are the main ways in which Santa uses technology to track and collect information relating to South Africans.

#### 4. *Social media*

Social media is a popular medium used for people to communicate with each other. Social networking is a subset of the internet and most of these networks have millions of users (Leong, 2015). It may be defined as "Internet-based, disentrained, and persistent channels of mass-personal communication facilitating perceptions of interactions among users, deriving value primarily from user-generated content" (Carr, 2015). This basically entails using online platforms to upload or send personal communications among online users. In South Africa, some of the biggest and most popular social media platforms used are Facebook, Instagram, WhatsApp, Twitter and Snapchat (BusinessTech, 2019).

Social media enables smartphone, tablet or computer users to express their communications online to a large group of people within these networks (Langmia, 2013). People may disclose personal information on their profiles and this act of disclosure is referred to as a user's 'visibility' to others, which may be controlled through privacy settings on social networks (Roos, 2012). A users profile is therefore visible to everyone else on social media unless they have controlled their visibility through the privacy settings (*Isparta v Richter*, 2013). This basically means that if social media users do not place restrictions on their visibility, their uploads are in the public domain and can be seen and accessed by anyone else.

Santa uses social media to track and check people's information and he can use this information to prepare his naughty and nice list. People also tend to feel safe to share information on social networks because they feel it is a controlled environment by sharing information to a specific audience on social media through privacy settings, however, this privacy is sometimes misconceived due to the visibility of their profiles to the general public (McGuinness, 2018). By monitoring and viewing social media posts, Santa can easily check the behaviour of South Africans through social media without them being aware that they are being watched. As people tend to upload their personal thoughts and communications, Santa can easily determine whether

they will receive a gift on Christmas day. Users tend to vent online or upload controversial pictures or comments and this can easily mean that in Santa's eyes they deserve a lump of coal. South Africa is comprised of millions of people and it may seem nearly impossible to track so many social media users. Santa has to therefore use other technologies to gather information for Christmas gift list.

## *5. Artificial intelligence*

Through social media websites, Santa may use artificial intelligence technologies to gather data and information about people to determine whether they have been naughty or nice. It has already been discussed that if social media users do not place visibility restrictions on their profiles then their information is publicly and readily accessible. He may also use AI to hack private social media profiles to gain that personal information that he would not be able to obtain by ordinary means. The unlawful surveillance of people by Santa however is not limited to social media. He may use AI to track other Internet-connected applications, such as WhatsApp, emails, SMS's, browser history on computers and cellular devices and blogs.

In short, AI involves intelligent computer-based systems using algorithms to learn systems and perform certain tasks (Villasenor, 2020). The applications of AI usually involve natural language processing and machine learning systems (Alarie & Niblett, 2018). AI can be based on determinative algorithms or on machine-learning algorithms that learn directly from training examples (Bathae, 2020). An "algorithm" is basically a sequence of steps programmed to move towards a goal and the AI algorithm can adapt over time as it learns from experiences (Villasenor, 2020). The natural language process involves analysing the use of words and phrases, whilst machine learning involves the process of enabling computers to learn to certain tasks without the benefit of explicit rules-based programming (Alarie & Niblett, 2018).

Santa may employ different types of AI methods to track and gather data for his Christmas list. Knowledge-based systems are based on

computers programmed to reason and make use of expert knowledge in their decision-making process, whereas machine learning systems rely on programming that can learn without explicit programming, and can change or learn when it receives new data (Barnett, 2018). As these systems are based on data, they utilise information received from the Internet or uploaded onto their systems. Much will also depend on the coding of its algorithms. Santa can therefore code his North Pole computer to process information from social media, websites and other Internet-connected devices such as WhatsApp and SMS's. Yet not everyone has a social media profile or access to electronic devices and Santa, therefore, has to rely on another method of surveillance.

## *6. Drones and reindeers*

Children are the ones who arguably look forward the most to Christmas due to the expectation of receiving presents from Santa. Not all children, however, have a social media profile, email address or cellphone that Santa may use to track their behaviour. Some students may have access to tablets or iPad's that Santa can rely on using their data, but not all children have access or own such devices. Santa, therefore, has to make use of other devices of surveillance that monitors children to determine who's naughty and nice and who would receive a lump of coal or gift on Christmas. One of these devices is Santa's drones that he makes his elves build in the North Pole for the sole purpose of surveillance and recording of private information. A "drone" may be defined as an aircraft that does not have a pilot but is controlled by someone else from the ground and mainly used for the purpose surveillance (Cambridge, 2020).

These drones are quite small and are often not seen by the people of South Africa, who are most of the time unaware that they are being watched and recorded. Santa's reasoning behind using drones is because of their capabilities. He can make millions of drones in his workshop and dispatch them on missions worldwide. Drones are often small flying structures that have the function to record a vast amount of information or data through photography, video, and sensors and can even pick up facial recognition or use night vision (Scharf, 2019).

These drones can give Santa live feedback of events taking place in our homes, workplace or wherever one may be. The drones can also record videos that Santa may playback at a later stage. The capabilities of drones make Santa's job easier in determining who gets Christmas gifts and its small size allows it to travel into our homes, schools and workplace.

Besides using drones as a recording device, Santa has one more way in which he can gather information. Many of you may not know that Santa also sends out his reindeer on reconnaissance missions to gather intel for his Christmas list. Although Santa may have many reindeer, his number one agent is Rudolph the red-nosed reindeer. The true reason why Rudolph's nose is red is that he is in fact recording your every move! Rudolph flies around 365 days a year video recording all the children for Santa to determine who's naughty or nice. The children are of course, unaware that they are being watched by Santa and his minions. Authors have argued that as drones become more advanced and popular, they are a common sight in the skies and this increases the likelihood that individuals' privacy will be invaded (Scharf, 2019). It is, therefore, necessary to briefly analyse how Santa has breached South African privacy rights.

## 7. *Privacy and the law*

It has been explained how Santa has broken the law and it is now necessary to briefly set out the applicable law. As mentioned above, the right to privacy is one of the laws that Santa should adhere to. Privacy entails seclusion from the public by an individual and may be infringed by an unauthorised act by an outsider on the individual or her personal affairs (Neethling, 2015). Bilchitz avers that the right to privacy seeks to protect the freedom of the individual against the arbitrary exercise of coercive power by the state and further provide the individual with a sense of personal security (Bilchitz, 2016). This has also been confirmed by South African case law, which provides that the right to privacy advocates the right in a person's personal life to be free from intrusions and interference by the State (*Gaertner v Minister of Finance*, 2014). This means that people have the right to be free from

government intrusions in order to feel some sort of safety from outsiders.

Generally, there are two forms of an invasion of privacy: the first is the unlawful invasion of the personal privacy of another and the second invasion involves the unlawful publication of private facts about another (*Financial Mail (Pty) Ltd v Sage Holdings Ltd*, 1993). Swales affirms that South African jurisprudence on privacy law is extensive and privacy is protected through the constitution, common law and the courts (Swales, 2016). Although this right is constitutionally entrenched, it is also protected and regulated through the law of delict, under the *actio iniuriarum* (Roos, 2012). In *Jansen van Vuuren v Kruger*, the court alluded to the fact that the *actio iniuriarum* protects a person's dignity and such dignity encompasses privacy and is therefore better described as a right of personality (*Jansen van Vuuren v Kruger*, 1993). Case law further entrenches that when a person suffers harm as a result of an intentional violation of a personality interest that person must institute an action for non-patrimonial damages in terms of the *actio iniuriarum* to claim compensation for harm suffered (*De Klerk v Minister of Police*, 2020).

Neethling, Potgieter and Visser aver that the recording of private facts is a wrongful infringement of privacy (Neethling, 2015). The authors further provide a list of what may constitute an unlawful invasion of privacy and it appears that Santa may be liable for all these invasions:

- entry into a private residence;
- secretly watching a person;
- reading private documents;
- listening into private conversations;
- shadowing a person; and
- as already mentioned above, recording of private information (Neethling, 2015).

The gross violations of privacy committed by Santa involve the secret surveillance of people to determine who's naughty or nice in order to receive gifts on Christmas day. One does not know when or where Santa is watching, but one does know that he is in fact watching us.

The use of AI tracking of social media, drones recording people in private places, as well as Rudolph recording and spying on South Africans may all constitute a gross invasion of privacy. In *S v I*, the court stated that the wrongdoer was not justified when he peeped through a window of the victim and this act was clearly an invasion of her privacy because her dignity was injured by the invasion of her privacy (*S v I*, 1976). In the *Hickman* case, the court held that the taking and copying of private documents constitutes an *injuria* (*Reid-Daly v Hickman*, 1981). Similarly, in *S v A*, the court held the planting of a transmitting device in another person's apartment that could listen into that person's private conversations constituted two separate acts, but both were a gross encroachment on a person's privacy and an impairment of his dignity (*S v A*, 1971). In the *Epstein* case, in terms of shadowing the court remarked that it is a principle of Roman law that if a person is shadowed and constantly followed or spied on, this constitutes a most "vexatious nuisance" and one should have a right to complain about such conduct (*Epstein v Epstein*, 1906). This was confirmed by *Huey Extreme Club v McDonald*, where the court agreed that shadowing is a nuisance and constitutes a wrongful invasion of privacy (*Huey Extreme Club v McDonald*, 2005).

Other than the common law, the right to privacy is also constitutionally protected. Section 14 of the Constitution (the Constitution of the Republic of South Africa, 1996) entrenches the right to privacy:

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"Everyone has the right to privacy, which includes the right not to have:

- (a) their person or home searched;
  - (b) their property searched;
  - (c) their possessions seized; or
  - (d) the privacy of their communications infringed".
- 

In the *Gaertner* case, the court reiterated that privacy is often seen as a fundamental personality right worthy of protection as part of human dignity and it is therefore necessary that the right to privacy in relation to the homes of individuals and their private possessions are protected and someone cannot gain entry or search such premises without

authority to do so (*Gaertner v Minister of Finance*, 2014). A person's right to privacy allows oneself to determine and to dictate the ambit of disclosure to others (*National Media Ltd v Jooste*, 1996). In the *Ketler case Investments v Internet Service Provider's Association*, the court stated that the right to privacy includes the right not to have one's personal information used by others without gaining some acceptable form of consent from that person (*Ketler Investments v Internet Service Provider's Association*, 2014).

McQuoid-Mason submits that in order to establish an infringement of the constitutional right to privacy, the plaintiff must prove she had a subjective expectation of privacy, which was objectively reasonable (McQuoid-Mason, 2000). The court in the *Gaertner* case stated that "the reasonableness of a person's expectation of privacy, and the strength of that person's privacy interest can vary depending on the regulatory scheme to which that person is subject" (*Gaertner v Minister of Finance*, 2014).

In *Bernstein v Bester*, the court provided that the 'reasonable expectation of privacy' test comprises two questions: first, there must be a subjective expectation of privacy and, secondly, the expectation must be recognised as reasonable by society (*Bernstein v Bester*, 1996). Burns argues that in South Africa, it is well-established in our law that once information has entered the public domain, there can be no legitimate expectation of privacy in relation to such information (Burns, 2015). As our homes are closely regarded as the most private and intimate spheres of our lives, South Africans have a reasonable expectation of privacy which Santa intrudes when he sends drones into our homes or tracks our social media on our private devices.

A contravention of section 14 of the Constitution may be regarded as an unlawful invasion of privacy, unless the breach is justified in terms of section 36 of the Constitution (McQuoid-Mason, 2000). Section 36 allows a right to be infringed if it is reasonable and justifiable in an open and democratic society. In terms of this section, one must also consider several factors to determine whether the limitation is warranted, including:



- (i) the nature of the right;
- (ii) the importance of the purpose of the limitation;
- (iii) the nature and extent of the limitation;
- (iv) the relation between the limitation and its purpose; and
- (v) less restrictive means to achieve the purpose.

As privacy is not absolute, it may be limited in certain circumstances. Privacy must be balanced with other competing interests and rights such as freedom of speech and access to information (Swales, 2016). Authors have also suggested that the general test to establish a wrongful infringement of privacy involves the *boni mores* or criterion of reasonableness (Neethling, 2015). It would appear that Santa would have to argue that his surveillance is reasonable and justified to limit the right to privacy as he has to decide whether to give South African gifts on Christmas day. His argument is unjustified as there are probably less restrictive means to achieve his information and the right to privacy has long been regarded as an important right to all. Although Christmas gifts may be important to some people, the right to privacy outweighs Santa's invasion. The access to information is not as important to the right to privacy in Santa's case, especially considering the methods he uses to gather that information.

Santa must also adhere to the Protection of Personal Information Act 4 of 2013 (POPI). One of the purposes of POPI is the safeguarding of personal information, subject to limitations aimed at balancing the right to privacy against other constitutional rights, such as the access to information (ss 2(a)(i)). Another purpose of the legislation is protection of the free flow of information within the Republic and across international borders (ss 2(a)(ii)). Bearing in mind that Santa resides outside the country, this is an important protection for South Africans. One may then argue that Santa is not subjected to this legislation, however POPI will apply to Santa even though he is not domiciled in the Republic because he makes use of automated or non-automated means in the Republic in collecting and processing the personal information of South Africans (ss 3(1)(b)(ii)). The definition of "automated means" falls within Santa's operations because it "means

any equipment capable of operating automatically in response to instructions given for the purpose of processing information" (s 3(4)).

The preamble recognises the constitutional right to privacy, which also includes a right to protection against the unlawful collection, retention, dissemination and use of personal information. POPI emphasizes the lawful processing of information and much relies on consent given by person whose information is being processed. Section 4 sets out certain conditions that need to be met by the responsible party for the lawful processing of information, read with section 9, which provides that personal information must be processed in a reasonable manner that does not infringe upon the right to privacy. Information is processed lawfully if it is done so in a reasonable manner that does not infringe the privacy a person (s 9(b)). Consent envisages any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information (s 1 read with s 11). Bearing in mind that Santa prepares the majority of Christmas gifts for children and children cannot give consent themselves, POPI states that a competent person may provide consent on a child's behalf to process the personal information (s 11(1)(a)). Consent must be obtained from a person to process his information, however, the processing may occur if it is necessary for pursuing the legitimate interests of the responsible party (ss11(1)(a)-(f)).

Santa is required to collect the personal information directly from the people he wants to gain information on (s 12(1)). There are, however, several exceptions to this general and two of which may apply directly to Santa. The first exception is that Santa does not have to collect the information directly from a person if that person has consented to the processing of such information (ss 12(2)(b)). This means that Santa can ask all those who wish to receive gifts to consent to him collecting their information and processing it to determine who has been naughty or nice. The second exception is that if the information has been made public by that person, Santa does not have to collect the information directly from that person (ss 12(2)(a)). In terms of social media therefore, public communications posted by users on their pages may be used by Santa because this falls within the public domain.

It appears that South Africa heavily protects the right to privacy and Santa's methods of gathering information for his Christmas gift list are unlawful and unconstitutional. He will need to change his approach and methods of information gathering to justify his conduct and practices.

## *8. Santa Claus and the way forward*

Santa is not above the law and needs to abide by South Africa's laws. In terms of the collection and processing of social media data, Santa should ask for consent from social media users. When one signs up on a social media website one has to accept its terms and conditions. Santa can easily also add a clause into these social media platforms asking for permission to view a user's content. If the user agrees, Santa may collect and process social media communications. If he does not get permission from a user, he will need to find an alternative way to determine if that person has been naughty or nice.

His AI algorithms should also be coded and programmed fairly and transparently so not as to discriminate against South Africans. For example, citizens should understand what information is collected and for what purpose and the grounds for not receiving a Christmas gift. Santa would need to carefully programme his AI algorithms to process social media communications and not to unjustly refuse a gift based on one communication.

In respect of his drones and Rudolph as recording devices, Santa will also need to obtain consent from the parents of children to monitor and collect information for his naughty and nice list. Without this consent, Santa's actions are unlawful and contravene the common law, the Constitution and POPI. Santa should clearly set boundaries for surveillance and respect the right to privacy, especially the privacy in one's own home. One must remember that information in the public domain can be used by Santa, but permission should still be sought from the person to whom it applies to.

Ironically, Santa is the one who is acting naughty due to his breach of privacy rights, however, should he rectify his conduct he will begin to

spread joy to South Africans again. It is clear that technology will continue to advance and it is clear that Santa has taken advantage of such developments. Technology such as AI needs to comply with the law to respect and protect the rights of citizens. We know Santa is watching us and once we have legally permitted him to do so, he may decide who is naughty and nice. Think twice the next time you post on social media or see a drone outside and remember to smile, otherwise, it may not be a Merry Christmas after all! And to you Mr Claus, we say get your act together or you shall face the mighty wrath of our Constitution and courts!

### 9. *List of references*

- Alarie B & Niblett YA "How artificial intelligence will affect the practice of law" (2018) 68 *University of Toronto Law Journal* 106-124.
- Badina E "Christmas in classic British detective fiction" (2016) 38 *Journal of Comparative Studies* 60-70.
- Barnett J & Treleaven P "Algorithmic dispute resolution – The automation of professional dispute resolution using AI and blockchain technologies" (2018) 61 *The Computer Journal* 399-408.
- Bathae Y "Artificial intelligence opinion liability" (2020) 35 *Berkeley Technology Law Journal* 113-170.
- Bernstein v Bester* (1996) 2 SA 751 CC.
- Bilchitz D "Privacy, surveillance and the duties of corporations" 2016 (1) *Journal of South African Law* 45-67.
- Burns Y *Communications Law*. 3rd ed (LexisNexis (2015)).
- BusinessTech (2019) "These are the biggest social media and chat platforms in 2019". Available at: <https://businesstech.co.za/news/internet/296752/these-are-the-biggest-social-media-and-chat-platforms-in-2019/>. (Accessed: 15 August 2020).
- Cambridge *Cambridge Dictionary "Drone"* (2020) <https://dictionary.cambridge.org/dictionary/english/drone> (Accessed: 15 August 2020).
- Carr CT & Hayes RA "Social media: Defining, developing and divining" (2015) 23 *Atlantic Journal of Communication* 46-65.

Christmaslyrics.com (2019) Christmaslyrics "Santa Claus is coming to town". Available at:  
<https://www.christmas-lyrics.com/christmas-songs-lyrics/santa-claus-is-coming-to-town-lyrics/> (Accessed: 20 August 2020).

*De Klerk v Minister of Police* (2020) 1 SACR 1 (CC).

*Epstein v Epstein* (1906) TH 87.

*Financial Mail (Pty) Ltd v Sage Holdings Ltd* (1993) 2 SA 451 (A).

*Gaertner v Minister of Finance* (2014) 1 SA 442 (CC).

Hillerbrand HJ (2020) "Britannica "Christmas Holiday". Available at:  
<https://www.britannica.com/topic/Christmas>. (Accessed: 24 August 2020).

History (2020) "Santa Claus". Available at:  
<https://www.history.com/topics/christmas/santa-claus>. (Accessed: 17 August 2020).

*Huey Extreme Club v McDonald* (2005) 1 SA 485 (C).

*Isparta v Richter* (2013) 6 SA 529.

*Jansen van Vuuren v Kruger* (1993) 4 SA 842 (A).

*Ketler Investments v Internet Service Provider's Association* (2014) 2 SA 569 (GJ).

Langmia K, Tyree TCM, O'Brien PC & Ingrid Sturgis (eds) *Social Media: Pedagogy and Practice* (Universal Press of America (2013)).

Leong N & Morando J "Communications in Cyberspace" (2015) 94 *North Carolina Law Review* 105-160.

McGuinness D & Simon A "Information disclosure, privacy behaviours, and attitudes regarding employer surveillance of social networking sites" (2018) 44 *International Federation of Library Associations and Institutions* 203-222.

McQuoid-Mason D "Invasion of privacy: Common law v constitutional delict — does it make a difference" (2000) 14 *Acta Juridica* 227-264.

*National Media Ltd v Jooste* (1996) 3 SA 262 (A) 271.

Neethling J, Potgieter J & Visser D *Law of Delict*. 7th ed. (LexisNexis (2015)).

*Reid-Daly v Hickman* (1981) 2 SA 315 (ZA).

Roos A "Privacy in the Facebook era: A South African legal perspective" (2012) 129 *South African Law Journal* 375-402.

*S v A* (1971) 2 SA 293 (T).

*S v I* (1976) 1 SA 781 (RA).

- Scharf R "Drone invasion: Unmanned aerial vehicles and the right to privacy" (2019) 94 *Indiana Law Journal* 1065-1108.
- Sky History (2020) "History of Santa Claus and Father Christmas". Available at: <https://www.history.co.uk/article/history-of-santa-claus-father-christmas>. (Accessed: 20 August 2020).
- Swales L "Protection of personal information: South Africa's answer to the global phenomenon in the context of unsolicited electronic messages (spam). (2016) 28 *South African Mercantile Law Journal* 49-84.
- Tikkanen A *Britannica* "Santa Claus legendary figure". (2020) Available at: <https://www.britannica.com/topic/Santa-Claus>. (Accessed: 20 August 2020).
- Villasenor J & Foggo V "Artificial intelligence, due process and criminal sentencing" 2020 (2) *Michigan State Law Review* 295-354.

16

*When Data is said to be the New Oil  
of the Digital Economy it is not  
Strange to see that Even Santa Claus is  
benefitting from its value*

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*Lara Smidt*

# THE LEGAL TIMES



**Lara Smidt**

The Privacy Regulator is to fine Santa a staggering R10 million for an alleged violation of the Protection of Personal Information Act 4 of 2013 (POPIA). A spokesperson for the Regulator commented, and said: *"The magnitude of the fine reflects the seriousness of Santa's blatant violation of POPIA."*

*When data is said to be the new oil of the digital economy it is not strange to see that even Santa Clause is benefitting from its value.*

Santa, operating from the North Pole, seemingly labours under the misapprehension that the Protection of Personal Information Act (POPIA) does not apply to him. Sources say that incompetent and insufficiently trained staff, including that of Mrs Claus and at least 100 elves over 60 years of age, contributes to the struggling, yet operational organisation.

POPIA applies to the processing of personal information that is or has been, manually or automatically entered into a record by a responsible party that is either domiciled in the union or not domiciled in the union but who makes use of means that are situated in the union.

Applying this to Santa's processing operations, we can easily conclude that POPIA applies to his personal information processing activities.

Looking at how he collects and uses information, one immediately notices that Santa's processing operations fall far short of the conditions for lawful processing of personal information as enshrined in article 4. In particular, the following conditions are violated:



### *1. Processing limitation*

By not requesting consent from parents or guardians for the processing of children's data, Santa has been violating the condition of processing limitation for years. What is more, POPIA requires data to be collected directly from data subjects, i.e. children. However, from an investigation, it seems like Santa has been collecting the data from other sources, oftentimes not even from the parents of children (who are competent to provide consent on behalf of children). The fact that Santa's target market is mainly younger than 7 years complicates this matter as the Children's Act 38 of 2005 now also needs to be considered.

### *2. Purpose specification*

Santa failed to take steps to ensure that children are notified, in plain language tailored to their standards, about the purpose of the collection of their data.

### *3. Information quality*

There is no evidence to demonstrate that Santa takes reasonably practical steps to ensure that the personal information he collects of children is complete, accurate, not misleading and up to date. This is especially important when profiles of children are created based on the information collected to conclude whether such children have been naughty or nice.

### *4. Openness and profiling*

Santa has failed to maintain a record of the personal data processing operations under his responsibility and failed to take reasonable steps to ensure that data subjects are aware of the fact that information about them is being collected from other sources, his address, the fact that he applies profiling techniques to the information collected to determine whether children have been naughty or nice.

## 5. Accountability

Judging from the aforementioned, it is clear that Santa has failed to ensure that the conditions in Chapter 3 of POPIA have been met.

According to Mr Jim Carry, Associate at the firm The Gringe Inc., *"Difficulty in complying with the law is not an excuse for not complying with the law. Nobody is making Santa process this data – he chooses to do so. And if he chooses to do so, then he has to accept the compliance responsibilities that come with it."* The Gringe Inc. is known for taking on trying cases and made news headlines again recently with their ongoing fight in the "WHO stole Christmas (and 90% of 2020)" case.

In light of this planned enforcement action, a spokesperson for Santa confirmed that Santa would review his organisation's privacy compliance obligations worldwide and would encrypt letters sent down chimneys, soon. More funds will also be allocated to staff training and system upgrades.

A close eye will be kept on the development of this matter. I foresee labour issues in terms of unmade beds and long naughty lists in future should no presents be present on Christmas morning!

## *Truth, Lies, Virtual Reality and Storytelling – Santa Claus and Teaching*

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*Dawie de Villiers*

### *1. Introduction*

This year parents in thousands of households would have discussed with their children about Santa Claus. I imagined how the discussion might unfold in a South African household in the middle of a pandemic year and thought it might go something like the following:

"Son come here, switch off your computer game and sit down next to me. I want to tell you a story about a man called Santa Claus. He is well known all over the world. His real name was Saint Nicholas, and he is famous for bringing presents to children. His story originated more than 1600 years ago, in Turkey. People wrote songs and poems about him. And you know what, he is still around today in our movies and our traditions. He owns reindeer that can fly while pulling his sleigh loaded full of presents for children all over the world that have been good during the year. Santa comes the day before Christmas and enters homes through the chimneys and leaves the presents next to the fireside. Children leave milk and cookies and sometimes even food for Santa's reindeers. He does not bring just any gifts. He brings what children want because he first invites children to write to him and make a list of the presents that they would prefer. Isn't this a great story?"

"Yes, Dad, but I have some questions. How will he deliver my presents because we do not have a chimney and what about the alarm and will

Bruno chase the reindeer away? Also, what about the lock-down where no one is allowed to travel or visit? Should we leave him a mask and sanitiser next to the cookies? Can I send him a text message or maybe even a voice note? And Dad, you always say that we should never lie, so be honest, is Santa real, and where did you hear this story for the first time?"

"Of course he is real Son. My father told me about him first, and you know your granddad never lies."

"Ok, Dad. But just promise that 'this is the truth, the whole truth and nothing but the truth'"

I found myself wondering how it came to be that most of us impress the need, to tell the truth on our children but at the same time are perfectly at ease in telling them these types of stories. There are good reasons why we tell children not to lie – it can break trust; diminish self-worth and, especially in the case of law, get you into a lot of trouble. At the same time, we do seem to accept that lying is not a precise thing and that 'white lies' or sharing stories such as Santa and the Easter Bunny are intended to benefit the other person and are therefore not quite so emphatically wrong.

This made me reflect on the role of storytelling in teaching law.

When are irony, fiction, virtual reality and especially storytelling a powerful learning tool? All of this can be found in the old and modern story of Santa Claus. There are also several legal lessons to be learnt. The main issue open for discussion is, how law lecturers can use storytelling as a manner or tool in the way in which we explain law principles to our students.

In law, lecturers must learn to adapt the stories we learn as children to the story of our legal system and use aspects of fiction and storytelling to explain reality.

It is during challenges with online-learning that law lecturers are getting aware of the difference between storytelling and story writing. This is especially true when 'irony' is being used as a tool in the teaching environment.

## 2. *When irony is used to convey a message*

Irony means "the expression of one's meaning by using language that normally signifies the opposite, typically for humorous or emphatic effect."

The term 'irony' has its roots in the Greek comic character Eiron. He was portrayed as a shrewd underdog who by his wit continuously triumphs over the egotistical character Alazon. The Socratic irony of many dialogues derived from this comic origin and became extremely popular. With irony go humour, satire, sarcasm and wit.

The role of these forms of communication has been an issue since the time of the Greek philosophers. Not only was it challenging to identify or detect irony but also even more challenging was to intentionally use it to achieve some or another goal.

It is accepted that the use of irony in the written format like poems or dramas should be distinguished from irony in speech, like in the classroom or courtroom environment. Although the use of irony may pre-dominantly be for entertainment purposes, its value as an educational tool should not be underestimated. One way is to use irony to criticise the current social and legal order. Another is to keep your audience (students) interested while putting them up for the challenge to distinguish reality from fiction and to clarify complex and challenging legal principles.

Lecturers should, however, be aware of the risks when using irony in explaining the law. They may manipulate their students into a specific thinking process that is not comparable to real-life situations. The skill that goes with this is to provide information and withhold it at the same time. This in itself may promote critical thinking, innovative ideas and a "think on your feet approach". It is the law lecturer that thinks outside the box that can use the ironies from the Santa Claus story to link the old with the new. Also, ethical issues (to tell the truth) and unethical issues (the misuse of a granddad) and how a person who commits various crimes became a hero.

The dramatic use of irony invites the listener and or viewer to re-think the relationship between law and justice. Law of evidence lecturers often state that it is more important to acquit ten guilty accused than to convict one innocent person. This is what the higher ideals of our legal system expect from us. This in itself may be the greatest irony and most sincere message of it all.

### 3. *The use of fantasy (fiction) as part of persuasive storytelling*

When one talks about 'fiction' we are generally meaning that something is not a true account, although it may be rooted in reality. As an example, when a story in a book or film is categorised as being fiction, it is understood as not being based on the truth or on facts. Another example of fiction is a lie that you have been told. The question is whether there is any role for fiction in an educational environment with law students where the determination of the truth is usually held out to be of the utmost importance?

Considering the answer brings one of the Santa Claus movies to mind.

"*Miracle on 34th Street*" is a 1947 American Christmas comedy-drama. It was written and directed by George Seaton and is based on a story by Valentine Davies. The film starred several famous actors such as Maureen O'Hara, John Payne, Natalie Wood and Edmund Gwenn and won three Academy Awards, one of which was by Valentine Davies – somewhat ironically - for the best writing of an original story.

In summary, the film is a courtroom drama about an apparently harmless old man who is convinced that he is Santa Claus. A sceptical prosecutor is adamant about having him committed to a psychiatric institution because of this ridiculous claim and also, obviously, because Santa Claus does not exist.

Most of the drama happens inside a courtroom where the main issue is the determination of the truth about the existence of a mythical figure that most people in America grew up with. What follows is a confrontation between legal procedure and fiction and some exciting

law of evidence issues. Kris Kringle or 'Santa Claus' is very outspoken in his belief that he is Santa Claus. Fred Gayley, his lawyer, decides to 'prove' the truth of his client's allegation. Documentary evidence is presented that the United States Post Office delivered hundreds of letters addressed only to Santa Claus, to Kringle. This was presented as an official act of the United States government. Because it was accepted as legal, it was also accepted as legally believable.

Outside the court, another drama unfolds. It is an election year and after the judge's campaign manager tells him "no one will re-elect a judge who puts Santa in a psychiatric institution" the judge officially 'recognises' Santa Claus' existence.

Behind the scenes, it is clear that neither Kringle's lawyer nor any other adult believes that Kringle is really Santa Claus. They are, however, prepared to accept that he is 'symbolically' Santa Claus. It is only on Christmas Day that circumstantial evidence from an independent source shows the attorney that reality and Kringle's version correspond. Gayley finally recognises in his last speech that what he thought were different truths are actually the same truth. Interestingly, this insight is discovered by means other than legal procedures and through the use of other evidence and reasoning.

The moral of the story is that truth is not always, or only, found in courtrooms and within legal processes. Rules of the law of evidence are meant to act as limitations to the abuse of the legal system. But as the film shows, lawyers cannot always rely on these in establishing the truth because sometimes their backgrounds, experiences and beliefs may have a significant influence on the outcome of justice. We need to acknowledge the complexity of the interaction of facts and fiction and how it can have an effect on the outcome of judicial processes. Fiction is what we think is untrue, but just because we believe it may be untrue, does not mean it can not hold value to our adaption of the legal system or the way we learn about it.

#### 4. *Storytelling and legal education*

People have been telling stories since the earliest times and the idea of using storytelling to persuade other people is not new. The same is true when using stories in a legal environment. What is however even newer is the recognition of the benefits and advantages of storytelling in a legal, educational context.

A good story does not necessarily need to be factually accurate. Even prominent fictional stories can still be quite persuasive where everyone knows it cannot actually be the truth. Fictional stories are sometimes easier to tell than true ones because where it is supposed to be true people naturally tend to listen a lot more critically. In this case, they look for contradictions and discrepancies, and where they find them, it can weaken the significance of the story. This is not the case if the story is being told as a fictional one as assessing the veracity of the story does not distract the listener.

We all tell our students occasionally "facts are often stranger than fiction". This is why it cannot be said that true stories automatically have more persuasive value. In fact, for many years this belief created some conflict in my decision-making process – should I use fiction or fact to illustrate a point? There were times that I was convinced to stick to real and factually verifiable stories. But even then, it cannot be guaranteed that the story was the 'whole truth'. It is just human nature that in all storytelling, including the reference to the correct version of the story that one tends to exaggerate or adjusts the precise truth. How far one may go will depend on the context and other circumstances surrounding the story at hand.

The use of storytelling in academia can, to some extent, be compared with storytelling in court. The audience will always subject the story to a critical review, which is coloured by their differing views. Whether a judge, magistrate or a law student hears the story, lecturers (or lawyers) must know that their audience is aware of the fact that the storyteller's objective is to persuade and to convince.

The difference probably lies in the understanding that students are aware of the fact that the lecturer is not obliged to tell the 'whole truth'



and that may even lead to scepticism. Another challenge to mention is where lecturers need to cross cultural, language and sometimes even ethical boundaries.

Not all law lecturers may appreciate the role that storytelling can play in legal education. Persuasive storytelling will depend to a large extent on the preference for linking the story to facts, which can be verified, or to fiction where there is no such need. This is, however, not as easy as it sounds. It may even be a tale of deception and a critical reflection on the relationship between storytelling and the law.

As a point of departure, we should acknowledge that by their nature, stories never tell the entire truth. All stories are told from a specific point of view. That may place boundaries on what can be said and whatnot. Change the point of view, and the story will change. What this means, is that stories are imperfect tools and in itself potentially deceptive if misused. Despite this incomplete nature of stories, they can be formidable instruments of persuasion - as long as we remind ourselves of the danger of deception when employing them in teaching. This chapter pursues to investigate the boundaries of legal storytelling in general and storytelling to students in particular.

A rational analysis of legal principles from a persuasion perspective cannot compare with storytelling. Not all lecturers are convinced of the strength of storytelling. This may be because lawyers are trained to prefer an analytical and rational approach to emotion-based decision-making. But when used with caution stories can enrich rather conflict with analytical reasoning.

This is because sometimes legal rules alone tell us very little about the law and the normative understanding thereof. Introducing stories in teaching can bridge this gap and at the same time make the learning experience more entertaining, convincing and relevant, while at the same time persuading our students to accept the need for the rule that is being taught. In this regard, focusing on actual rules only is inadequate for both practical and jurisprudential reasons. Strict compliance with teaching the prescribed rules ignores the background context which gives them meaning and consequently insights for

students as they become aware of the role that individuals or groups played in bringing life and meaning to the stories.

It is essential that any high-level understanding of 'law' should include more than just the standard statements that are expressed in legal rules. Rules more often than not, lack clear definition, depth and applicability unless they are read with the stories and narratives that give them meaning and purpose. It is often said, "One cannot determine the meaning of rules or the priority among rules that conflict until stories put some flesh on the bare bones of those rules."

Legal pragmatists continuously remind us of the importance of stories. Using a narrative approach has become more and more popular in legal scholarship. Although some authors use 'narrative' and 'story' interchangeably, they are not the same thing. With a story, we find a description of something that happened, either as fact or fiction. A narrative on the other hand indicates a broader subject or implication.

Stories can help students appreciate how the law works and offer a specific context for understanding legal problems. But this is not the only value they hold. They are often better than conventional methods of legal analysis. They can build bridges across race, gender, class and sexual orientation.

Returning to my earlier dilemma as to whether it is better to use stories based on fiction or real facts, the answer is not easy. The usefulness of fiction can be compared to using simulation in moot courts or law clinics. It is, however, not precisely the same. With simulation, one requires the participants to do role-playing after been given a set of facts and the instruction to solve a problem or perform some form of lawyering.

Without disregarding any specific form of storytelling, there are of course limits to using stories based on fiction. Suppose a lecturer wants his students to understand what lawyers actually do. In that case, I have found a story based on real facts to be the better option. It is even better if the incident happened to the lecturer, as students will find it easier to believe and relate to the outcome of the event. The reality is that a lawyer may have some idea of what they would do in a specific

situation. But until they are confronted with that situation, they cannot know the answer for certain.

What goes to the heart of lawyering is telling stories, teaching about stories and learning from stories. Unlike in practice, law lecturers do not always need to choose between real life and fiction. We have the best of both worlds and can combine fictional stories with real stories, and they can even complement each other.

It is only when we appreciate the role of storytelling in the classroom that we can understand its role in the judicial process. It is often said that trial lawyers are, and should, view themselves as storytellers. They should, therefore remain conscious of their storytelling role at all phases of the litigation process. With this being said, it is, of course, important to bear the limitations to the storytelling process, such as the available evidence, procedural and evidential rules and the principles of substantive law, in mind.

### *5. Storytelling into the future with virtual reality*

The rise of virtual reality has turned science fiction into fact. What does this mean for teaching law? Does it have a role to play in legal education? Is it a modern form of storytelling worth investigating? We should carefully consider the positive and normative implications of virtual reality technology to see its potentially dramatic impact on the teaching of law.

Virtual worlds are in essence online settings, which allow users to interact with one another in a simulated environment. With the increasing interest in virtual reality software, it is becoming relatively cheap and is readily accessible. Due to the considerable interest in this technology, almost every major player in the global technology market starts to develop and launch affordable virtual reality products. People were talking about the "Virtual Reality Renaissance". Various types of virtual reality headsets with its software, body and hand controllers and even 3D cameras hit the market. Large companies like Facebook, Google and Microsoft predict that the public would love to engage

and interact in virtual social environments that are simulating physical reality.

The virtual reality helmet or headset is probably the most common device with estimates showing that about 70 million units will be sold between 2018 and 2022. These helmets are used to imitate real events through video and audio channels.

It has already been proven that VR technology can be used in teaching successfully to present students with complex information. This has the potential to improve both the quality and efficiency of education.

Virtual reality can be the vehicle to electronically linking students not only with their fellow students and lecturers but also with practising advocates and attorneys.

An argument can be made that there can only be one reality based on real facts and to expand that in our discussions with our students can only confuse them. We, however, do not have a choice but to accept that a concept like extended reality (XR) is here to stay. XR indicates a range of incidents, which blurs the division between the real world and a simulated world. XR can itself be divided into virtual reality and augmented reality or mixed reality. With augmented or mixed reality, the point of departure is still a real-world environment. It is influenced through digital content into a digital environment that substitutes the real world as the only point of reference.

Is it, therefore, possible to tell a story in virtual reality? The answer is yes. It may still be that people putting on a VR headset anticipate some form of a gimmick. It needs not to be like that. The submission is to promote VR and 360-degree video simulations to do a lot more, and the first step should not be too difficult. This is to capture the attention and interest of our students.

Let us be practical. For large groups of students, we need to focus on mobile VR or also known as smartphone virtual reality headsets. These devices are compatible with most android and iPhone smartphones as long as the phones can fit inside the headset. Everything of

technological importance is already on the smartphone uploaded with a VR application. For that reason, the headsets are quite affordable.

So where to find content, to use with the VR storytelling option in the classroom environment? At the moment, apart from VR games, there are limited options for educational or training applications that are available from the Oculus Store, the iOS App store and the Android Play store. The number of new material, however, grows by the minute. Perhaps, in the short term universities need to develop and share their material. For example, the University of Johannesburg's Faculty of Law has recently launched several videos, which can be used in a teaching and learning environment. Instead of only making these available in video format; they could be developed into VR interactive material.

The most essential characteristic of VR storytelling has to do with 'presence'. The sensation of being part of the action is what makes VR distinct and exceptional. If a lecturer can succeed in creating this feeling amongst students who want to be involved, the rest will come naturally. We then have a captive audience that will listen and respond to our new approach to storytelling. The difference with this kind of storytelling is that we can exploit the very nature of VR/360°. That is that our students (viewers) will not only have a passive need to engage actively with legal matters.

The next characteristic of VR 360° storytelling is 'point of view' (POV). As storytellers, we must remain in charge and know when to directly focus on the issue that we want our students to address. Without realising it, our students are put in a position of either seeing things through an identified character's eyes (first-person POV) or of objectively assessing the actions of some other character (third-person POV).

Both options have some important lessons to learn from. If, for example, a crime scene is created, the students can be the detective (first person) or experience it in the third person. They are even then not totally passive, because it may be required from them to critically analyse the characters. They could also be challenged to come up with

innovative ideas of what was good or what went wrong and how they would have acted differently.

The last characteristic of VR storytelling is the importance of 'space'. What the lecturer as a storyteller wants to achieve is to have their ideas, messages, rules, exceptions and applications being put to fair use when filling all available space. How we use the space is more important than any individual character or even the plot of the story. It is only when we can identify all space possibilities and opportunities that we get our students to imagine stories of their own. They can then link that to the legal issues that we eventually want them to better understand.

Virtual reality as a storytelling tool is, however, not so easy as it may appear. With traditional storytelling, the storyteller is entirely in charge, and the students as the audience can decide whether they want to listen, watch or participate. Not so with VR storytelling. Here the storyteller and listener are participants in an interactive process.

The participation may, however, differ in degree. It may be as slight as the moving of the head during a decision-making process of where you want to look. Or it can be as complicated as taking control by way of manipulating virtual appearances through movements of hands or controls. This freedom comes with its challenges because the storyteller may lose control over what they want to achieve with the story. We must therefore acknowledge that this technology is still relatively new and in an experimental phase. Not all law modules may consequently be as susceptible to piloting it immediately.

Reliable research has shown that students have better memory retention and understand a lot better when they actively participate in active learning. This is nothing new.

It was Confucius who said:

"I **listen**, and I forget, I **watch**, and I remember, I **do**, and I understand."

Thousands of years later VR as a teaching method may be just the answer that we were all waiting for. It offers detailed conceptions and recreations through active participation and a better learning

experience. What makes it even more impressive is that it is not like traditional interactive methods. Question and answer techniques with a few students at a time are not inter-active for the rest of the class. With VR, the target audience can be huge groups. Not to mention the advantages that this may bring to situations like our current demands for social distancing.

One good thing that came out of the COVID-19 pandemic is that it made us recognise the flaws and defects in our education system. This may also even be the techniques that we practised and became used to over many years. It also emphasised the inequality amongst our population and that the traditional ways of teaching and learning are not the only ways. VR may just be the tool to bring about changes that all students can benefit from when the technology hopefully becomes more accessible to lecturers and students.

Law schools all over the world have started experimenting with VR technology. This is not to mention the legal industry and law enforcement where it is already in use to re-create crime and accident scenes. It may, however, still take a while before VR is seriously considered as a training tool in many law faculties. At the moment, law schools are experimenting with Virtual reality and Augmented Reality technology. We still do not know for sure how to integrate it into our LLB curriculum. Only the brave will invest and prioritise to be on the cutting edge of this technology. This is, however, not only about a financial investment but even more important is to get energetic and creative writers and storytellers to provide excellent and educationally sound content. That will convince the most sceptical person that this new method of teaching may complement a curriculum and deserves a chance.

If VR continues to become part of our lives, I can imagine the discussion, which I started off taking a different turn.

"Listen, Dad, about Santa Claus. You told me that you have often **heard** about Santa's story. You have **read** books about him. You have **watched** a movie in black and white and then in colour about the man. Now I want us to **do** things together with Santa Claus. So can we please

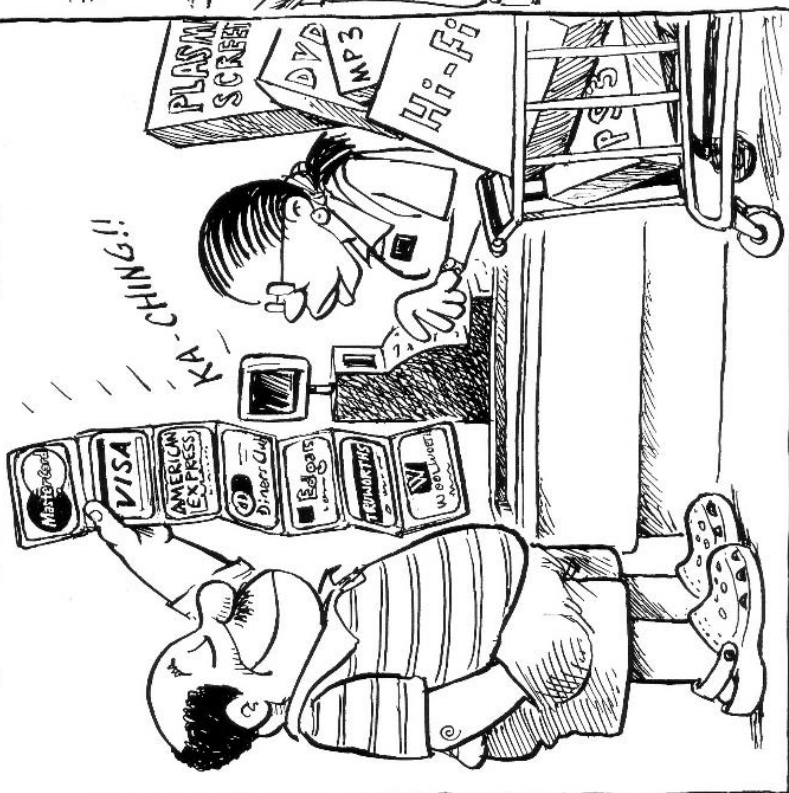
download our Santa Claus VR App on our smartphones, put it into our VR headsets and join Santa Claus for the ride of a lifetime. Only then will I believe that Santa Claus is real or shall I rather say "virtually realistic".

The Dad then just closed his eyes and saw, even without any VR headset, two ancient people smiling. The one was Santa Claus and the other Confucius.



# SOUTH AFRICAN Seasonal Traditions

## CHRISTMAS CARDS



## ..AND THE NEW YEAR HANGOVER



21-12-06 ZAPERO  
JANET MANSING

## Part 6

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*Disentangling COVID-19  
from the Christmas Cheer*

# 18

## *St Nicholas, a Performance Guarantee and Covid-19*

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*Charl Hugo*

I

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*Santa said, "It cannot be,  
It seems I'm now old,  
No doubt far too bold,  
For, in order to lure,  
One back to the fold,  
I went to procure,  
This demand guarantee,  
(to secure my performance you see)."*

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II

*4 September 2020: The invitation*

The Director of the Centre for Banking Law of the University of Johannesburg looked in astonished incredulity at his computer screen displaying the following message in the Christmassy colours of green, red and white:

St. Nicholas is inviting you to a scheduled Zoom meeting.

Join Zoom Meeting

<https://lap4web.zoom.us/j/78954299413?pwd=a1lpbWFkbkVrT2t6S0E2WXcvakVEDz09>

Meeting ID: 788 5429 9413

Password: 123Nare1

The meeting was scheduled for 23h10-23h50 on 24 September 2020 – exactly 3 months from Christmas Eve.

Of course, the mixture of COVID19 and the Fourth Industrial Revolution had changed the way meetings were conducted and had broken down national and continental borders, but an invitation from St. Nicholas! – did this not break down a far more distant border – that is between fantasy and reality?<sup>1</sup>

Grossly intrigued he knew that he would be clicking on the hyperlink at the appointed time.

### III

#### *24 September 2020: 23h09: Explanations and instructions*

‘Click’.

The familiar zoom screen opened up in front of the Director, followed by the usual assurance that the host would let him in shortly. Seconds later the screen blinked and he was staring with skeptical interest at the red-cloaked and white-bearded figure displayed. The face was ageless yet lined; every line told a story – most were happy stories but there were sad ones too. The eyes shone with wisdom and kindness. The Director’s skeptical interest made way for overwhelming peace,

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<sup>1</sup> Saint Nicholas of Myra, also known as Nicholas of Bari, was an early Christian bishop of Greek descent from the maritime city of Myra in Asia Minor during the time of the Roman Empire. Because of the many miracles attributed to his intercession, he is also known as Nicholas the Wonderworker. Born: 15 March 270 AD, Patara. Died: 6 December 343 AD, Myra [but he lives on prominently]. (Wikipedia).

serenity and joy. Somehow *this* Director of *this* Centre for ('black-letter') Banking Law, suddenly knew with complete certainty, that he had become part of something very special.

He engaged the computer audio: "St Nicholas", he said with joyful reverence, "how very good to meet you". The kind eyes smiled at him shortly, but then, strangely and incongruently, clouded over with anxiousness.

"I have a problem and need expert advice as to what I must do. It concerns a performance guarantee, and I have been advised by my banker that your Centre commands significant knowledge in this field."

And so the Director, who knew little other law, but something about guarantees received the most memorable brief of his career. ...

#### IV

*26 September 2020 (quick service you see!): The opinion*

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### **OPINION PROVIDED TO ST NICHOLAS RE PERFORMANCE GUARANTEE**

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#### *Background facts*

- 1 Tshepo Mahlako, the proud son of a Pedi banker living in a village in the Waterberg, yearned for a pair of new football boots, which he had hoped he would find at the foot of his bed, by courtesy of St Nicholas, on Christmas morning 2019.<sup>2</sup>
- 2 This did not happen.

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<sup>2</sup> Although St Nicholas day is 6 December, Tshepo and his family, as respected protestants, expected the patron saint of children to visit on Christmas Eve. See <https://www.whychristmas.com/customs/fatherchristmas.shtml> (accessed 4 September 2020).

- 3     There was a good reason for this unfortunate non-event. It appears that:
- 3.1    On Christmas eve 2019, when the sleigh bearing Tshepo's boots entered South African territory, it was hijacked, as so many other vehicles in South Africa, by a group of violent thugs.
- 3.2    The reindeer managed to escape, shaken but unscathed, and fled back north, north and further north.
- 3.3    St Nicholas, who had suffered a bad blow to the head, was only rescued two days later by a less timid team of reindeer who brought him home.<sup>3</sup>
- 4     Conscious-stricken, St Nicholas returned to the Waterberg one month later, by way of a very special 'dream visit',<sup>4</sup> in which he promised Tshepo that the football-boots issue was a temporary setback and that he would receive his boots next Christmas.
- 5     To the dismay of St Nicholas, however, Tshepo confided in him that he had lost faith in the patron saint of children. He further shared with St Nicholas that the only promises he believed to be trustworthy, were the promises of bankers – an important truth drilled into him from an early age by his father.

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<sup>3</sup> "Some people say that Santa lives at the North Pole. In Finland, they say that he lives in the north part of their country called Lapland." (See <https://www.whychristmas.com/customs/fatherchristmas.shtml> - accessed 4 September 2020.) This matter seems to be somewhat of a mystery – but is not of importance for the purposes of this opinion.

<sup>4</sup> It is a bit unclear exactly what a "dream visit" is. When pressed on this point St Nicholas responded, somewhat exasperated, that we would not be able to comprehend this type of visit but assured us that it was no less real than a zoom meeting. He hinted at a journey between different dimensions which may perhaps become possible by the time of the 13<sup>th</sup> Industrial Revolution.

- 6 There being no suitable bank at the North Pole or in Lapland, St Nicholas visited the town of his original roots, now known as Demre, in Turkey.<sup>5</sup>
- 7 He arranged an appointment with a personal banker at the Denizbank-demre Şubesi,<sup>6</sup> describing his dilemma.
- 8 His banker, who had attended a summer school at the University of Augsburg in July 2020,<sup>7</sup> where he was lectured competently on guarantees by the Director as visiting scholar, explained to St Nicholas that the perfect answer would be for the Denizbank, on application of St Nicholas, to issue a performance guarantee in favour of Tshepo.

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<sup>5</sup> Demre, also known as Kale, is the current name of the ancient town of Myra, metropolis of Lycia in the early Christian times. It has the most beautiful Greco-Roman and Lycian ruins of the region. Myra was one of the six most important cities of ancient Lycia, along with Xanthos, Patara, Olympos, Pinara, and Tlos. ... In the 4th century AD, Myra was the capital of the Roman province of Lycia. ... Saint Nicholas, born during the 3rd century in nearby Patara, was the bishop of Myra in the 4th century. He became famous for his charitable nature and for miraculously curing diseases ... He died December 6, 343 in Myra and was buried in his cathedral church [yet somehow lived on and, to the glory of God, continues to do so]." See <http://www.turkishculture.org/archaeology/myra-1075.htm> (accessed 4 September 2020).

<sup>6</sup> SWIFT code: **DENITRIS296**; Bank code: **DENI**, Country Code: **TR**, Location Code: **IS**, Branch Code: **296**.  
[http://www.thebankcodes.com/swift\\_code/r.php?bs=y&bv=DENIZBANK+A.S.&p age=6](http://www.thebankcodes.com/swift_code/r.php?bs=y&bv=DENIZBANK+A.S.&p age=6) (accessed on 4 September 2020).

<sup>7</sup> The Augsburg summer school is very popular with Turkish students, a fact that the Director of the Centre for Banking Law discovered when teaching there in June 2019. The high praises given by the saint's banker for his teacher at the summer school was the main reason why the Centre was approached by St Nicholas for legal advice.

### *The guarantee*

- 9 On 24 March 2020 Tshepo received by special courier (a sleigh drawn by reindeer), an imposing document. It provided as follows:

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**"Performance Guarantee in favour of Tshepo Mahlako, in the Waterberg**

As security for delivery by St Nicholas on 24/25 December 2020 to Tshepo Mahlako of 1 pair of Adidas football boots, the Denizbank-demre Şubesi hereby promises to pay to Tshepo Mahlako the amount of R3000 on first written demand delivered to our correspondent bankers, Capitec Bank, Vaalwater, on or after 26 December 2020. The demand shall allege that no football boots were delivered by St Nicholas on 24/25 December 2020, and that for this reason the guarantee is being called up. This guarantee, which is independent of the underlying promise by St Nicholas to deliver the football boots referred to above, and should not be interpreted as being accessory to this promise, is issued subject to the Uniform Rules on Demand Guarantees (URDG) 758 of the International Chamber of Promise. The guarantee expires on 24 January 2021."

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### *The problem*

- 10 The concern of St Nicholas is that due to travel restrictions in South Africa imposed by the Government in the wake of the COVID19 pandemic, he may be precluded from delivering the football boots to Tshepo on Christmas Eve 2020.
- 11 Against this background he seeks legal advice regarding the consequences should Tshepo call up the guarantee.

### *Legal position*

- 12 The legal question can be simply stated thus: does (legal) impossibility of performance of the underlying contract (in this



case the promised donation) excuse the guarantor (Denizbank-demre Şubesi) from its obligation to honour its guarantee?

- 13 Despite the unusual and disastrous factual situation (the pandemic and concomitant restrictions on the community) the law regarding this issue is simple. The guarantor must pay. It has no defence. In this respect the Centre points out the following:

- 13.1 The guarantee is subject to the URDG 758. Article 5(a) provides as follows:

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"A guarantee is by its nature independent of the underlying relationship and the application, and the guarantor is in no way concerned with or bound by such relationship. A reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defences arising from any relationship other than a relationship between the guarantor and the beneficiary."

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- 13.2 This foundational principal<sup>8</sup> of the law of guarantees is well-established in case law throughout the world.<sup>9</sup> The inability of the contractor in the underlying contract (in this case St Nicholas) to perform his obligations arising from the contract underlying the guarantee is the very risk that gave rise to the issuing of the guarantee. The

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<sup>8</sup> See Hugo "Bank guarantees" in Sharrock (ed) *The Law of Banking and Payment in South Africa* (2016) 438.

<sup>9</sup> See, for example *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd* 2010 2 SA 86 (SCA) par 20; *Dormell Properties 282 CC v Renasa Insurance Co Ltd* 2011 1 SA 70 (SCA) par 38; *Eskom Holdings Soc Ltd v Hitachi Power Africa (Pty) Ltd* 2013 ZASCA 101 (12 September 2013) par 14; *Edward Owen Engineering Ltd v Barclays Bank International Ltd* 1978 QB 159 (CA) 171A-C; *RD Harbottle (Mercantile) v National Westminster Bank Ltd* 1977 2 All ER862 (CA) 870; and *Intraco Ltd v Notis Shipping Corporation (The 'Bhoja Trader')* 1981 2 Lloyd's Rep 256 CA 257.

reason why this contract has not been performed (irrespective of how good it may be) is simply irrelevant.

- 14 So, if Tshepo were to call up the guarantee by means of a demand in compliance with the requirements of the guarantee, the bank must and will pay. Once the bank has paid, moreover, it will be entitled to recover the money paid from its mandator (St Nicholas).
- 15 The position would be different if it were to be impossible for the bank to pay. However, in this technological age of the Fourth Industrial Revolution, physical travel in order to pay a debtor is not necessary. Electronic funds transfers, despite all the concomitant problems relating to fraud and phishing,<sup>10</sup> are well-established and functional.

### *Advice*

- 16 The hard approach of a skeptic, against this background, would be simply to point out that if the guarantee is called up, St Nicholas would have to live with the consequences as set out above; it will accordingly have to find R3000 to reimburse the bank that properly paid the guarantee in accordance with the mandate it received from Tshepo. Put differently in the words of a common Afrikanerism: the Wet van Transvaal will apply: "k\*\*\* en betaal".<sup>11</sup>

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<sup>10</sup> On which, see *inter alia*, Malan & Nagel "Reflections on cheques, payment instruments, phishing and codification" in Hugo & Kelly-Kelly Louw (eds) *Jopie Jurist Mentor Supervisor Friend* (2017) 55; Booysen "Tackling payment scams: A comparative review" in Du Toit & Hugo (eds) *Annual Banking Law Update (ABLU)* (2019) 1; Plato-Shinar "Regulating liability for unauthorised digital payments: Insights for South Africa" in Hugo (ed) *Annual Banking Law Update (ABLU)* (2020) (forthcoming) 1.

<sup>11</sup> It is not for the authors of this opinion to seek reasons as to the Saints concern – if it was monetary, for by all accounts he is a very wealthy man. See

- 17 This memorable interaction between the Centre and the patron saint of children, however, has closed the door to cynical skepticism firmly. The Centre accordingly points out respectfully, that St Nicholas should take into account (as pointed out above) that, not without reason, he is widely known as "the wonderworker" and "for miraculously curing diseases".<sup>12</sup> The solution, therefore, seems:

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"St Nicholas, it would seem  
You would best serve your cause  
No longer to pause  
But worthwhile it deem  
To rid us this year  
of COVID19".

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Dated this 26<sup>th</sup> day of September 2020.



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University of Johannesburg  
Advocate of the High Court  
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++27 (0)11 559 4077 (office) – not really functional in COVID context  
++27 (0)88 000 0000 (cell)

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<https://www.whychristmas.com/customs/fatherchristmas.shtml> (accessed on 6 September 2020).

<sup>12</sup> See <http://www.turkishculture.org/archaeology/myra-1075.htm> (accessed 4 September 2020).

V

*26 September 2020: Invoice:*

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It is truly no jest  
That for this strange request  
No money's required.  
But take note my friend  
What this Centre needs  
and is widely desired  
Is a buffalo of beads  
(For the Centre – of course – only the best!)

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## *Elves to the (Business) Rescue...!*

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*Juanitta Calitz*

It was a rainy afternoon in July 2020. The whole world was in lockdown and every news channel was dedicated to news about a deadly virus sweeping across the globe. Mrs Claus was sitting on her favourite purple couch, stroking Ethel her beloved reindeer. She was thinking of the millions of children around the world who would be eagerly waiting for the arrival of Santa Claus. "Ethel, I do hope we can save the business. How will we ever be able to explain to millions of children that Santa went on a Sunday afternoon joy ride and never returned?"

The next minute Alabaster Snowball storms into the room. "They're here, the legal team is here! Or rather, they are here on the computer. The meeting is about to start". Alabaster is the only Elf that holds a legal degree from Oxford. Over the years, he has been responsible for looking after the financial and legal matters of the company and quite recently, Santa ordered him to secretly invest millions of the company's dollars in Bitcoin. "Are you feeling ill Alabaster? You're looking a bit pale". Alabaster felt his heart sinking. "No Ms Claus I'm fine, just fine." Stroking his beard, he was trying to stay calm. If only he knew the private key to the bitcoin wallet, but together with Santa's disappearance, it is all a bit of a mystery to him.

The next minute a team of profoundly serious men and women wearing dark suits and coats appeared on the computer screen. A few squeaky Elves were hanging around in the room not sure what was expected from them. "Well, Alabaster, why don't you welcome our guests?" "No need Mrs Claus, this meeting won't last long. As you know the company, Santa & Co, was placed under administration and a team of Administrators has been appointed to oversee the

management and possible rescue of the company. It should be noted, by all present, that the alternative to rescuing the company would be a formal liquidation procedure. I can just mention that with Santa disappearing with the laptop containing all the financial information, it was quite a challenge to come up with a rescue plan. Fortunately, we were able to procure post-commencement finance in the form of a financier, and we will be publishing the rescue plan within the next 10 days." Ms Claus stood up from the couch and walked across the room. She paused in front of the computer. "May I ask who this investor is?" The awkward silence was only disrupted by a nervous giggle from one of the Elves. A high-pitched voice from the computer said, "Mr Grinch ... he may have had a few encounters with Santa and the Elves". Mrs Claus turned around and stormed out of the room.

Alabaster took a deep breath. "Is there nothing we can do?" "I'm afraid not. The situation looks rather bleak. As a result of the COVID-19 pandemic the toy factory has been mothballed and the supply chain has been severely affected. We still owe millions of dollars to Amazon for taking over last year's drone deliveries. Oh, and by the way, with the little financial information we could gather it seems as if a large amount of money has recently been withdrawn from the company's account. Any idea what that was all about?" "No, no idea at all". Alabaster could feel the blood draining from his face. "Santa where in the world are you?" ...he whispered to himself.

The next few days a ghostly silence filled the house. Mrs Claus finished the last of the South African wine and Ethel developed a nervous twitch. Alabaster and the few remaining Elves baked banana bread and took up yoga. On the morning of the 3<sup>rd</sup> day, Alabaster was again reading the Companies Act for the 100<sup>th</sup> time when suddenly it hit him. "Yes! We can save the business!" he shouted.

He quickly called all the Elves together and explained the concept of equity crowdfunding to them. Immediately they created a special purpose vehicle (SPV) to bid for the company's assets. They proceeded to phone and email every friend and donor they could think off and very soon Sandy the Sandman was also on board, who recently made quite a fortune assisting Elon Musk with his insomnia. "Now to get the

Administrators on board," said Rosa Evergreen, who was recently appointed as the spokesperson to the team.

A Zoom meeting was set up that same afternoon and Rosa explained to the Administrators, that the SPV would be anchored by a private investor, who had written the algorithm that had been used for years to identify the location of the children. She explained that the funding model would be partly funded by a few private investors and the remaining funds would be raised through the crowdfunding scheme. This would ensure that the employees and local and international applicants would be able to invest in the business, in exchange for shares. The head of the Administrator's legal team's lips started moving. "You're on mute Hans". "Sorry about that, I was just going to say that as Administrators we fully support this model." Secretly he was relieved not to ever have to do business with Mr Gringe again.

Two weeks later Mrs Claus held a special dinner to celebrate the occasion. She was busy proposing a toast when suddenly, the door flew open and a wet and confused looking Santa stood in the doorway. Ethel immediately jumped up and flew past Santa to give Rudolph the red nose reindeer, a tight hug. Mrs Claus stood up from her chair and suddenly there was an iciness in the room. "Nicholas Claus, may I ask where in the world have you been?" Santa knew that he had to explain very carefully or a bed of straw in the reindeer shed was very much part of his future. He took a deep breath and started mumbling something about forgetting the private key to the Bitcoin wallet and trying to find Satoshi Nakamoto the founder of Bitcoin in Japan. When all of a sudden all the airports were closed and the Santa sleigh was not able to hack into the air traffic control systems and we were all stranded on an island in the middle of the South China Sea. Oh, and then the reindeer developed a taste for Sake and returned to Japan to work on the rice farms. Mrs Claus looked at him and thought to herself that maybe it was time to start thinking of a succession plan.

That evening while Santa was sitting in front of the fire, Alabaster quietly sneaked in and whispered to Santa: "The key ...could you remember the key?" "Oh Yes! It struck me the minute I saw Mrs Claus with the glass of Merlot. I also have to thank you and the Elves for

rescuing the business!" Alabaster shook his head and thought to himself... maybe it is time we started thinking of a succession plan.



## *Santa's Mission to Happiness*

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*Anzanilufuno Munyai*

Far away at the North Pole, lives Santa Claus. An old, funny and white-bearded man. A day after Christmas in the year 2019, Santa was in admiration and filled with so much joy and happiness that everyone enjoyed the Christmas gifts he delivered.

On one very snowing day, Aurora, a beautiful elf with big brown eyes, brown like the African deserts and hair soft as coconut shreds, ran to Santa whilst he was sipping his rich chocolate milk with ginger biscuits, to inform him that there has been a decline in the happiness scale in China.

A worried Santa rushed to the workroom filled with thousands of elves to investigate.

"Oh Santa, I'm afraid we may have a problem. The people in China are getting sad every minute. With presents delivered a week ago, they were supposed to be filled with happiness. I am worried Santa! How are we going to fix it? We need to make them happy again!" said Freebie, a nerdy elf wearing big, but funny glasses.

A worried Santa sits on a chair. Using his right hand, he fixes his posture and starts brushing his beard. While Santa floats in his thoughts, the elves are busy working very hard to make the world a happy place.

Moments later and filled with excitement, Santa says to everyone 'a-haa!! I have a place...I know exactly what I have to do'. With everyone waiting in anticipation to hear the great plan, Santa calls Freebie, 'I need more details on why the people in China are sad'. While typing fast on his laptop, Freebie said, "its SARS-CoV-2". A confused Santa

looked at him and said 'in simple terms please'. "oh yes yes...sorry about that. SARS-CoV-2 is a respiratory virus making people have [a] fever, dry cough, sore throats etc. Meaning, if you are planning on going there, it might be dangerous because you might get the virus, get sick and die and we cannot imagine a world without Santa now can we?".

With every elf scared and sad for the people in China, Santa decides that since he cannot go to China and make people happy, he will access all their devices to spread love and happiness. "Bad idea Santa, that's hacking. That's like...like privacy invasion," said an astonished Freebie. In his response, Santa said, "but how is that different from me entering people's homes through chimney's at night when everyone is asleep?", "then perhaps you should ring the door bell-then," said Freebie. "And where would the surprise be in that then?" said Chucky, an elf who was pulling a big bag with thousands of wishes from the wish volt to place them on Santa's feet for him to make them come true.

Santa stood up and proceeded to his office. He opened the door went straight to his red chair, pulled the chair from the big, thick wood table and sat down. Switching on his computer he realized that he will access people's social media accounts and every two hours post messages on happiness to tip over the scale of happiness. With his computer up and running, Santa begins to post messages impersonating the owners of the accounts. He continues to do that for a week only taking breaks for his routine rich chocolate milk at 8 am, lunch at 1 pm and a fluffy delicious fish for dinner at 6 pm. In the meantime, the people of China have reported to the President that someone who is impersonating them has tempered with their social media accounts and they request the police to find this person.

One morning, Aurora bursts into the office weeping, "Santa, the virus. It's spreading all over the world". "Oh noo, more people are getting sad," said a sad Santa.

By end of March 2020, Santa found out that his favourite country, South Africa, was under lockdown, leaving people unemployed, scared

and frustrated. The worried Santa continued to access social media account of all who had Covid-19.

People around the world started complaining about someone impersonating them on social media, China and South Africa with the most social media account infringements.

Since China and South Africa are part of Brazil, Russia, India, China and South Africa (BRICS), they decided to investigate the complaints together. After weeks of investigations, they could not find who was responsible. This led to the leaders of these countries establishing an investigation unit, the SS (Spice Squad) that will investigate both earthlings and extra-terrestrials.

Finally, in April, good news. "Mam...I'm afraid we have a lead", said Okefu, the SS captain, a beautiful and intelligent smooth melanin skin wearing a suit made of the finest Ankara prints.

"Hmm...Go on" said the President of China, Gémìng nǚwáng, a fierce woman with a strong posture sitting at her desk looking at the window, wondering about her people. "Our technicians uncovered the location where these account take-overs are occurring. We traced the IP address to the North Pole", says Okefu.

"Its Santa, isn't it" says Gémìng nǚwáng.

"Yes. I'm afraid so" responded Pam as she puts the file on the desk.

"Send the Pack to the North Pole and bring him in. In the meantime, I will call the lady Iftiin to inform her of the discovery. Please put in a report and we will look through specific infringements of his actions", says Gémìng nǚwáng.

Determined, Okefu calls in the Pack, a group of strong-willed women and briefs them of their North Pole mission.

In a call with Lady Iftiin, the South African President, the leaders thoroughly analysed their cybersecurity-related laws. On the one hand, Gémìng nǚwáng concluded that Santa violated its recently adopted Cyber Security Law of the People's Republic of China. On the other hand, Lady Iftiin concluded that Santa has to be accountable based on

the Electronic Communications and Transactions Act and the Protection of Personal Information Act.

At nightfall, the Pack headed to the North Pole. Freezing, the Pack surrounded Santa's home and Jazz knocked at the door. Freebie, opened the door and alerted Santa that someone is at the door to see him. A worried Santa approached the door and Jazz proceeded to inform him that he was under arrest for infringing the rights to privacy against the people of China and South Africa. To explain, they put him in their unicorn-themed jet, headed for the SS headquarters leaving the elves weeping for their beloved Santa.

